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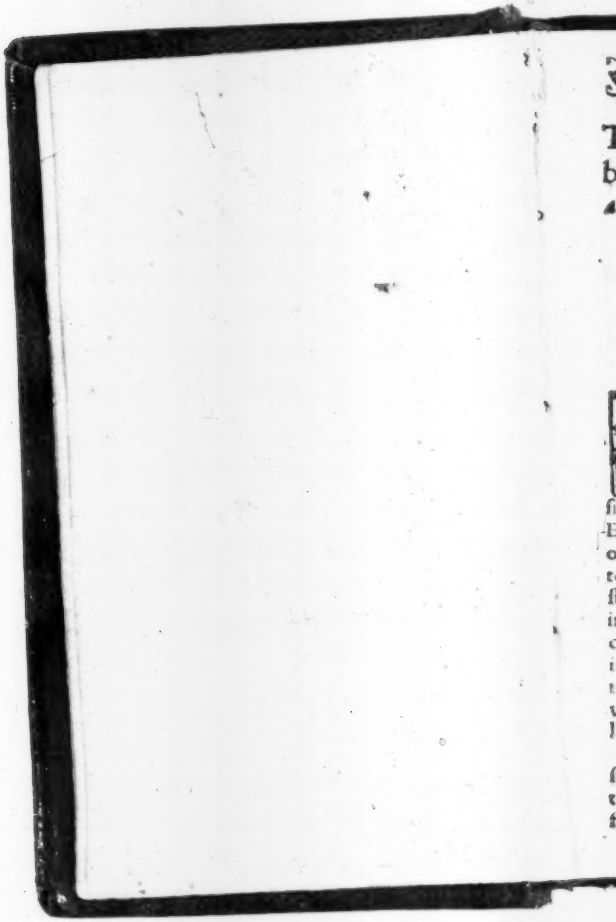
In THE *Eyre*
DIALOGVE
in English, between
a Doctor of *Dutlinrie*,
and a Student in the
Lawes of Eng-
land.

Newly corrected and
Imprinted, with new
Additions.



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Cum Privilegio.



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The first Dialogue in English,
betwixt a Doctor of Diuinitie, and
a Student in the Lawes of England, of
the grounds of the said Laws, and of con-
science, newly corrected and est-
soones Imprinted with new
Additions.

& The Introduction.



Doctor of Diuinitie that was
of great acquaintance and fami-
liaritie with a Student in the
Lawes of England, said thus
vnto him, I haue had great de-
sire of long time to know wherupon the law of
England is grouded, but because the most part
of the Law of England is written in the French
tongue, therefore I cannot through mine own
studie attaine to the knowledge thereof: for
in that tongue I am nothing expert. And be-
cause I haue found thee a faithfull friend to me
in all my businesse, therfore I am bold to come
to thee before any other to know thy mind,
what be the very grounds of the Law of Eng-
land as thou thinkest.

St. That would aske a great leasure, & it is al-
so aboue my cūning to do it. Neuertheles, that
thou shalt not thinke that I would wilfully re-
fuse to fulfill thy desire, I shal with good wil do

A ij.

that

The first Chapter.

that is me is to satisfie thy mind: But I pray thee that thou wilt first shew me somewhat of other lawes that pertaine most to this matter, & that Doctors treat of, how lawes haue begun. And the I wil gladly shew thee as me thinketh what be the grounds of the law of England. *Doct.* I will with good will doe as thou saiest: Wherefore thou shalt vnderstand that Doctors treat of foure lawes, the which (as me seemeth) pertaine most to this matter. The first is the law eternal. The second is the Law of nature of reasonable creatures, the which as I haue heard say, is called by them that be learned in the law of England, the Law of reason. The third is the law of God. The fourth is the law of man. And therefore I will first treat of the law eternall.

Of the Law eternall.

Cap. 1.

Like as there is in every artificer a reason of such like things as are to be made by his craft: so likewise it behoueth that in every gouernour there be reason and a foresight, in governing of such things as shall be ordered & done by him, to them that he hath the gouernance of. And soasmuch as almightie God is the creator and maker of all creatures, to the which he is compared as a workman to his workes: and is also the gouernour of all doings and movings that be found in any creature: Therfore as the reason of the wisdom of **G O D** (in asmuch as creatures be created by him) is the reason & foresight

light of all crafts and works that haue been or shall be, so the reason of the wisdom of God mouing al things by wisdom made to a good end, obtaiyeth the name & reason of a law, and that is called the law eternall.

And this law eternall is called the first law, & it is well called the first, for: it was before all other lawes, and all other lawes be deriued of it, wherupon Saint Augustine saith in his 1. Booke of Free arbitrement, that in Temporall lawes, nothing is righteous ne lawfull, but that the people haue deriued to them out of the law eternall. wherfore euerie mā hath right & title to haue & he hath righteously, of the right wise iudgement of the first reason, which is the law eternall. *Sc.* But how may this law eternal be knowne: for as the Apostle writeth in the 5. chapter of his first Epistle to the Corinthians, *Quæ sunt dei nemo scit, nisi spiritus Dei.* That is to say, no man knoweth what is in God, but the spirit of God: wherfore it seemeth that he openeth his mouth against heauen, that attēp- teth to know it. *Doct.* This law eternall no man may know as it is in it selfe, but onely blessed souls that see God face to face. But al- mighty God of his goodnesse sheweth of it as much to his creatures as is necessarie for the, for els god shold bind his creatures to a thing impossible: which may in no wise be thought in him. Therefore it is to be vnderstood, that 3. manner of ways almighty god maketh this law eternall knowne to his creatures reasonable. First, by the light of natural reason. Secondly, by heauenly reuelatio. Thirdly, by the order of a

The second Chapter.

Prince or any other secundarie gouernour that hath power to bind his subiects to a law.

And when the law eternal or the will of God is knowne to his creatures reasonable by the light of naturall vnderstanding, or by the light of natural reason, that is called the law of reason: and when it is shewed by heauenly reuelation in such maner as hereafter shall appeare, then it is called the law of God. And when it is shewed vnto him by the order of a Prince, or of any other secundarie gouernour, that hath a power to set a law vpon his subiects, then it is called the law of man, though originally it be made of God. For laws made by mā that hath receiued therto power of god, be made by God. Therefore the said three laws that is to say, the law of reason, the law of God and the law of man, the which haue seuerall names after the maner as they be shewed to man, be called in God, one law eternall.

And this is the law of which it is written, *Prouerbiorum octauo*, where it is said, *Per me reges regnant, & legum conditores, iusta discernunt*. That is to say, by mee kings raigne, and makers of lawes discern the troth: and this sufficeth for this time of the law eternall.

¶ Of the law of reason, the which by doctors is called the law of nature of reasonable creatures.

Cap. 2.

First it is to be vnderstood, that the Law of nature may be considered in two maners, that

that is to say, generally and specially: When it is considered generally, then it is referred to all creatures, as well reasonable, as unreasonable, for all unreasonable creatures live under a certaine rule to them giuen by nature necessarie for them to the conseruation of their being, but of this Law it is not our intent to treat at this time. The law of nature specially considered: which is also called the law of reason, pertaineth onely to creatures reasonable, that is, man, which is created to the image of God.

And this Law ought to be kept as well among Iewes, and Gentiles, as among Christian men, and this Law is alway good and righteous, stirring & inclining a man to good, and abhorring euil. And as to the ordering of the deeds of man it is preferred before the law of God, and it is written in the heart of euery man teaching him what is to be done, and what is to be fled: and because it is written in the heart, therefore it may not be put away, ne it is neuer changeable by no diuersitie of place, ne time, and therefore against this law, prescription, statute, nor custome, may not preuaile, and if any bee brought in against it, they bee not prescriptions, Statutes, nor customs, but things void and against Justice, and all other lawes, as well the lawes of God, as to the acts of men, as other, be grounded thereupon.

Su. With the law of reason is written in the heart of euery man, as thou hast said before teaching him what is to be done, & what is to

The second Chapter.

be fled, and the which thou sayest may neuer be put out of the heart, what needeth it then to haue any other Law brought in, to order the acts and deeds of the people?

Do. Though the law of Reason may not be chaunged nor wholly put away. Neuerthelesse before the law written, it was greatly let and blinded by euill customes, and by many sins of the people, beside our original sin. Insomuch that it might hardly be discerned what was righteous and what vnrightheous, & what was good and what euill. Wherefore it is necessary for the good order of the people, to haue many things added to the law of reason, aswel by the Church, as by secular Princes, according to the manners of the countrey and of the people, where such additions should be exercited. And this law of reason differeth from the law of God in two maners. For the law of God is giuen by reuelation of God, and this law is giuen by a naturall light of vnderstanding. And also the law of God ordereth a man of it selfe by a nigh way to the felicitie that euer shall endure. And the law of reason ordereth a man to the felicity of this life.

Se. But what be the things that the law of reason teacheth to be done, and what to be fled, I pray thee shew me.

Doct. The law of reason teacheth that good is to be loued, and euill is to be fled. Also that thou shalt do to another, that thou wouldest another should doe to thee. And that wee may doe nothing against trueth. And that a man must liue peacefully with other. That Iu-
stice

Justice is to be done to every man, and also that wrong is not to be done to any man.

And that also a trespasser is worthy to be punished, and such other: of the which follow divers other secondary commandements, the which be as necessarie conclusions, deriued of the first. As of that commandement that good is to be beloued, it followeth that a man shall loue his benefactor: for a benefactor in that he is a benefactor, includeth in him a reason of goodness, for els he ought not to be called a benefactor, that is to say, a good doer, but an euill doer. And so in that he is a benefactor, he is to be beloued in all times, and in all places: And this law also suffereth many things to be done, as that it is lawfull to put away force with force. And that it is lawfull for every mā to defend himselfe and his goods against an vnlawfull power. And this law runneth with every mans law, and also with the law of God, as to the deeds of mā, and must be alwaies kept and obserued, and shall alway declare what ought to follow vpon the generall rules of the Law of man, and shall restrain them if they be any thing contrarie vnto it.

And heere it is to be vnderstood, that after some men the Law whereby all things were in common, was neuer of the Law of Reason, but onely in the time of extreame necessity. For they say, that the Law of reason may not be chaunged, but they say, it is euident that the Law whereby all things should be in common, is chaunged, wherefore they con-

The third Chapter,

conclude, that was neuer the Law of Reason.

¶ Of the law of God.

Cap. 3.

The Law of God is a certaine law giuen by reuelation to a reasonable creature, shewing him the will of God, willing that creatures reasonable bee bound to doe a thing, or not to do it, for obtaining of the felicitie eternall. And it is said for the obtaining of the felicity eternall, to exclude the lawes shewed by reuelation of God for the politicall rule of the people, the which be called Iudicials. For a law is not properly called the law of God, because it was shewed by reuelation of God, but also because it directed a mā by the nearest way to the felicitie eternall, as been the lawes of the old Testament, that bene called Morall, and the lawes of the Euangelists, the which were shewed in much more excellēt manner, thā the law of the old Testament was: for that was shewed by the mediation of an Angell: But the law of the Euangelists was shewed by the mediation of our Lord Iesu Christ, God and man: and the Law of God is alway righteous and iust, for it is made and giuen after the will of God. And therefore all acts and deeds of man, be called righteous and iust, when they be done according to the Law of God, and be conformable to it. Also sometime a law made by man is called the law

law of God. As when a law taketh his principall ground vpon the law of God, and is made for the declaration or conseruation of the faith, and to put away Heresies, as diuers lawes Cannons, and also diuers lawes made by the cōmon people sometime do. The which therfore are rather to bee called the Law of God, than the law of man. Yet neuerthelesse, all the Lawes Cannon be not the Lawes of God: for many of them be made onely for the politicall rule and conseruation of the people. Wherupon Iohn Gerson in the treatise of the Spirituall life of the Soule, the second Lesson, and the third Corollary, saith thus: All the Cannons of Bishops nor their decrees be not the Law of God: For many of them bee made onely for the politicall conseruation of the people. And if any man will say: Bee not all the goods of the Church spirituall, for they belong vnto the spiritualtie, and lead to the spiritualtie: wee answer: That in the whole politicall conuersation of the people, there bee some specially deputed and dedicated to the seruice of God, the which most specially (as by an excellencie) are called spirituall men, as religious men are. And other, though they walke in the way of God, yet neuerthelesse, because their office is most specially to be occupied about such things as pertaine to the Commonwealt, and to the good order of the people, they bee therfore called secular men or lay men. Neuerthelesse, the goods of the first may no more be called Spirituall, than the goods of the other, for they be things incommen-

The third Chapter.

temporall, and keeping the bodie as they do in the other. And by like reason, Lawes made for the politicall order of the Church, be called many times spirituall, or the lawes of God. Neuerthelesse, it is but vnproperly. And other be called Ciuill, or the Lawes of man. And in this point many be oft times deceiued, and also deceiue other, the which iudge the things to be spirituall, the which all men know bee things temporall and carnall. These be the words of Iohn Gerson in the place alleaged before. Furthermore, beside the Law of reason, and the law of man, it was necessarie to haue the law of God, for foure reasons.

The first because man is ordained to þ end of the eternall felicitie, the which exceedeth the proportion and faculty of mans power. Therefore it was necessarie that beside the law of reason and the law of man, hee should be directed to his end by a law of God.

Secondly, forasmuch as for the vncertainty of mans iudgement, specially of things peculier and seldome falling, it happened oft times to follow diuers iudgements of diuers men, & diuersities of lawes, and therfore to the intent that a man without any doubt may know what he should do, and what he should not do: It was necessarie that he should be directed in all his deeds by a law headenly given by God, the which is so apparant, that no man may swerue from it, as is the law of God.

Thirldy, man may only make a law of such things as hee may iudge vpon, and the iudgement of man may not be of inward things, but
onely

The fourth Chapter.

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onely of outward things, and neuerthelesse it belongeth to perfection that a man bee wel ordered in both, that is to say, aswell inward as outward. Therfore it was necessarie to haue the Law of G O D, the which should order a man aswell of inward things as of outward things.

The fourth is, because as S^t aint Augustin saith in the first booke of free Arbitrement, the law of man may not punish all offences: for if all offences should be punished, the common wealth should be hurt, as is of contracts. For it cannot be auoided, but that as long as contracts be suffered, many offences shall follow therby, & yet they be suffered for the common wealth. And therfore that no euill should bee unpunished, it was necessary to haue the Law of God that should leaue no euill unpunished.

¶ Of the law of man.

Cap. 4th

The law of man (the which sometime is called the law positine) is deriued by reason, as a thing which is necessarie & probably following of the law of reason, & of the law of god. And that is called probable in that it appeareth to many, & specially to wise men, to be true. And therfore in euery law positine well made, is somewhat of the law of reason, and of the law of God. And to discern the law of god & the law of reason frō the law positine, is very hard, And though it be hard, yet it is
much)

The fourth Chapter.

much necessarie in euery mozall doctrine, and in all Lawes made for the comon wealth. And that the law of man be iust and rightwise, two things be necessarie, that is to say : wisdom and authoritie. Wisdom, that hee may iudge after reason what is to be done for the Comminalty, & what is expedient for a peaceable conuersation and necessarie sustentation of them. Authoritie, that hee haue authoritie to make Lawes, for the Law is deriued of Ligare, that is to say, to bind. But the sentence of a wise man doth not bind the Comminaltie, if hee haue no rule ouer them. Also to euery good Law be required these properties, that is to say, that it be honest, rightwise, possible in it selfe, and after the custome of the countrie, conuenient for the place and time, necessarie, profitable and also manifest, that it be not captious by any darke sentence, ne mixt with any priuat wealth, but all made for the common wealth. And after Saint Bridget in the 4. book in the hundred twentie nine chapter, Euery good law is ordained to the health of the soule, and to the fulfilling of the lawes of God, and to induce the people to shie euill desires, and to do good workes. Also the Cardinall of Cambrer writeth, Whatsoeuer is righteous in the law of Man, is righteous in the law of God. For euery mans Law must bee consonant to the Law of God. And therefore the Lawes of Princes, the commandements of prelates, the statuts of comminalties, ne yet the Ordinance of the Church is not righteous nor obligatory, but it be consonant to the law of God.

And

And of such a Law of man that is confor-
mant to the Law of God, it appeareth who
hath right to Lands and goods, and who not:
For whatsoeuer a man hath by such lawes of
man, he hath righteously. And whatsoeuer
is had against such Lawes, is vnrightheously
had.

For lawes of man not contrarie to the law
of God, nor to the law of reason, must bee ob-
serued in the law of the soule: and he that de-
spiseth them, despiseth God, and resisteth God.
And furthermore as Gratian saith, because e-
uill men feare to offend for feare of paine: Ther-
fore it was necessary that diuers paines should
be ordeined for diuers offences, as Physitions
ordeined diuers remedies for seuerall diseases.
And such paines be ordeined by the makers of
Lawes, after the necessitie of the time, and af-
ter the disposition of the people. And though
that law that ordeined such paines hath there-
by a conformitie to the law of God, (for the
law of God commaundeth that the people shal
take away euill from among themselves) yet
they belong not so much to the Law of
G O D, but that other paines (standing the
first principles) might bee ordeined and ap-
pointed therfore, that is the law that is called
most properly the Law Positiue, and the law
of man.

And the Philosopher said in the third booke of
his Ethikes that the intent of a maker of a law
is to make the people good, and to bring them
to vertue. And although I haue somewhat in
a generall shewed thee wherupon the law of
Eng-

The fift Chapter.

Englā is groundēd (Foz of necessitie it must be groundēd of the said lawes, that is to say, of the law eternall, of the law of reason, and of the law of God) Neuerthelesse, I pray thee shew me moze specially wherupon it is groundēd as thou thinkest, as thou before hast promised to doe.

Stu. I will with good will doe therein that lyeth in mee, foz thou hast shewed mee a right, plain, and straight way therto. Therefore thou shalt vnderstand that the law of England is groundēd vpon sixe principall groundes. First it is groundēd on the Law of Reason. Secondly, on the Law of God. Thirdly, on diuers generall Customes of the Realme. Fourthly, on diuers Principles that be called Maxims. Fifthly, on diuers particuler Customes. Sixthly, on diuers Statutes made in Parliaments by the King, and by the Common Counsell of the Realme. Of which groundes I shall speake by order as they be rehearsed before. And first of the Law of Reason.

¶ Of the first ground of the Law
of England.

Cap. 1.

The first ground of the law of England is the Law of Reason, wherof thou hast treated before in the 2. Cha. the which is kept in this Realme, as it is in all other realms, & as of necessitie it must needs be (as thou hast said before.) D. But I would know what is called the law of Nature after the laws of England,

England. St. It is not vsed among them that be learned in the lawes of England to reason what thing is comanded or prohibited by the law of nature, & what not, but al the reasoning in that behalf is vnder this maner. As whe any thing is grounded vpon the law of nature, they say, that reason wil & such a thing be done & if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done. Doct. Then I pray thee shew me what they that be learned in the lawes of the realme hold to be comanded or prohibited by the law of nature, vnder such termes and after such maner as is vsed among them that be learned in the said lawes.

St. There be put by them & be learned in the lawes of England two degrees of the Law of Reason, that is to say, the law of reason primary, & the law of Reason secondary: by the law of reason primarie be prohibited in the Lawes of England murther (that is & death of him that is innocent) periuie, disceit, breaking of the peace, & many other like. And by the same law also, it is lawfull for a man to defend himselfe against an vniust power, so he keep due circumstance. And also if any promise be made by mā as to the body, it is by the law of reason voyd in the lawes of England. The other is called the law of Secondary reason, the which is diuided into two branches, that is to say, into the lawe of a Secondary reason general, and into a law of Secondary reason particular. The law of a Secondary reason generall, is grounded and deriued of the generall law, or generall custome

The 5. Chapter.

custome of proprietie, whereby goods moveable & immoveable be brought into a certaine proprietie, so that every man may know his owne thing. And by this branch bee prohibited in the lawes of England disseising, trespassse in lands & goods, rescusse, theft, unlawfull withholding of another mans goods, & such other. And by the same law it is a ground in the law of England, that satisfaction must be made for a trespassse, and that restitution must be made of such goods as one man hath that belong to another man, the debts must be paid, covenants fulfilled, & such other. And because disseising, trespassse in lands & goods, theft, and other, had not bene knowne, if the law of proprietie had not bin ordained: Therefore all things that be derived by reason out of the said law of proprietie, be called the law of reason secundarie generall, for the law of Proprietie is generally kept in all our countries.

The law of reason secundarie particuler, is the law that is derived upon divers Customes generall and particuler, & of divers Maximes and Statutes ordained in this realme. And it is called the law of reason secundarie particuler, because the reason in that case is derived of such a law that is only holden for law in this realme, and in none other realme.

Doct. I pray thee shew me some speciall case of such a law of Reason secundarie particuler for an example. Sen. There is a law in England, which is a law of custome, that if a man take a Distresse lawfully, that he shall put it in pound onert, there to remaine till hee bee satisfied

tied of that he distrained for. And then there-
 upon may be asked this question, that if the
 beasts dye in pound for lack of meat, at whose
 perill dye they, whether dye they at the perill of
 him that distrained, or of him that oweth the
 beasts? D. If the law be as thou saiest and
 that a man for a iust cause taketh a distresse, &
 putteth it in the pound Duert, and no Law
 compelleth him that distreinet to giue them
 meate, then it seemeth of reason that if the dy-
 stresse dye in pound for lacke of meate, that it
 dyed at the perill of him that oweth the beasts,
 and not of him that distrained, for in him that
 distrained there can be assigned no default, but
 in the other may be assigned a default, because
 the rent was unpaid. Sen. Thou hast giuen a
 true iudgement, and who hath taught thee to
 doe so, but reason deriued of the said generall
 custome? And the law is so full of such secun-
 dary reasons deriued out of the generall Cu-
 stomes and Maximes of the realme, that some
 me haue affirmed that al the law of the realme,
 is the law of reason. But that cannot bee pro-
 ued as me seemeth, as I haue partly shewed
 before, and more fully will shew after. And it
 is not much bled in the lawes of England, to
 reason what law is grounded vpon the Law
 of the first reason Primarie, or on the Law
 of reason secundarie, for they bee most com-
 monly openly knowne of themselves, but for
 the knowledge of the Law of reason secunda-
 rie is greater difficultie, and therefore there-
 in dependeth much the maner and forme of ar-
 guments in the lawes of England.

The 6. Chapter.

And it is to be noted that all the deriuing of Reason in the Law of England proceedeth of the first principles of the law, or of some thing that is deriued of them: and therefore no man may right wisely iudge ne groundly reason in the lawes of England, if he be ignorant in the first principles. Also all birds, fowles, wild beasts of forrests and warren & such other be excepted by the Lawes of England out of the said general law and custome of property. For by the lawes of the realme no property may be of the in any person, vntlesse they be tame. Nevertheless the eggs of Hawks, Herons, or such other as build in the ground of any person, be adiudged by the said lawes to belong to him that oweth the ground.

¶ Of the second ground of the law of England.

Cap. 6.

The second groſſe of the law of England
is the law of God, & therfore for puniſh-
ment of the that offend againſt the Law
of God, it is enquired in many courts in this
realme, if any hold any opinion ſecretly or in
any other manner againſt the true catholike
faith. And alſo if any general cuſtom were di-
rectly againſt the law of God, or if any ſtatute
were made directly againſt it: as it were orde-
ned that no almes ſhould bee giuen for no ne-
ceſſity, the cuſtom & ſtatute were void. Neuer-
theleſſe the ſtatute made in the xxij. yere of R.
Ed. 3. & herby it is ordeined that no mā vnder
paine of imprisonment ſhal giue any almes to
1. Ed. 6. 21. Ja. 1. 8. p. 2. 1. 3. any

any baliāt beggers ꝑ may wel laboz, that they may so be compelled to labour for their living, is a good statute, for it obserueth the intent of the law of God. And also by authoritie of this law there is a ground in the laws of England that he that is Accursed shall maintain no action in the kings court, except it be in very few cases, so that ꝑ same excommunication be certified before the kings iustices in such maner as the law of the Realme hath appointed: and by the authoritie also of this ground, the law of England admitteth the spiritual iurisdiction of Dioces & offerings, and of all other things that of right belong vnto it, and receiue alio al laws of the Church duly made, and that exceed not the power of them that made the. In somuch that in many cases it behoueth i kings Iustices to iudge after the laws of the church. Do. How may that be, that the kings Iustices should iudge in the kings courts after the law of the church: for it seemeth that the Church should rather giue iudgemēt in such things as it may make lawes of, thā the kings Iustices. Se. That may be done in many cases, whereof I shal for an example put this case, if a writ of right of ward be brought of the bodie &c. And the tenāt cōfessing the tenure, & the nonage of the infant saith, that the infant was married in his auncesters daies &c. wherupon xij. men be sworn which giue this verdict, that the infant was married in the life of his auncestours, and that the woman in the life of his auncestour sued a diuorce, wherupon sentence was given that they should bee diuorced, and that the

The 6. Chapter.

heire appealed, which hāgeth yet vndiscussed,
praying the aid of the Iustice to know whe-
ther the infant in this case shalbe said married
or no. In this case if the law of the Church be
that the said sentence of Diuorice standeth in
his strength & vertue vntil it be adnulled vpon
the said appeale: That the infant at the death
of his ancelloz was vnmarried, because þ first
marriage was adnulled by that diuorice: and if
the law of the Church be that the sentēce of the
diuorice standeth not in effect till it be affirmed
vpon the said appeale, then is the infant yet
married, so that the value of his marriage can-
not belong vnto the Lord, and therfore in this
case iudgement conditional shal be giuen &c. &
in likewise the kings Iustices in many other
cases shall iudge after the law of the Church,
like as the spirituall iudges must in many ca-
ses, form their iudgemēt after the kings laws.
D. How may that be, that the spirituall Iud-
ges should iudge after the kings laws: I pray
thee shew mee some certaine case thereof. Siu.
Though it be somewhat a digression from our
first purpose, yet I will not withsay thy de-
sire, but will with good will put thee a case of
two therof, that thou maist the better perceiue
what I meane. If A. & B. haue goods iointly
and A. by his last will bequeath his portion
therein to C. & maketh the said B. his Execu-
tor & dyeth, and C. asketh the execution of this
wil in the spiritual court: In this case þ Iud-
ges there be bound to iudge that will be void,
because it is void by the lawes of this realme.
And likewise if a man be outlawed, and after
by

by his wil bequeath certaine goods to John at Stile, & make his executors & die, the king letteth the goods & after giueth the againe to the executors, & after Joh. at Stile sueth a citation out of the spiritual court against the executors, to haue execution of the will: In this case the iudges of the spirituall court must iudge & wil to be void, as the law of the realme is that it is, and yet there is no such law of forfeiture of goods by outlawrie in the spirituall law.

¶ Of the third ground of the Law of England.
Cap. 7.

THe third ground of the law of England, standeth vpon diuers General customes of old time vsed through all the Realme, which haue bin accepted & approued by our soueraigne lord the king & his progenitors, & all his subiects: & because the said customs be neither against the law of God, nor the law of reason, and haue bin alway taken to bee good and necessarie for the commonwealth of all the Realme: Therefore they haue obtained the strength of the law, insomuch that he that doth against them, doth against Justice: and these be the customes & properly be called the Common law, and it shall alway be determined by the Justices whether there be any such general custome or not, and not by xij. men, and of these general customes, and of certaine principles & be called Maximes, which also take effect by the old custome of the Realme (as shall appeare in the Chapter next following) beyonther most part of the law of this Realme.

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And therfore our soueraigne Lord the king at his Coronation among other things taketh a solenne oath, that he shal cause al the customs of his realme faithfully to be obserued. Do. I pray the shew me some of these generall customs. Sr. I wil with good wil, & first I shall shew the how the custome of the Realme is the verie ground of diuers Courts in the Realme, that is to say, of the Chancery, of the R. bench, of the common plees, and the Exchequer, the which be courts of record, because none may sit as Iudges in these courts but by the kings letters patents. And these courtes haue diuers authorities, whereof it is not to treat at this time. Other courts there bee also only grounded by the custome of þ realme, that bee of much lesse authoritie than the courts before rehearsed. As in euery Shire within the realme, there is a court that is called the county & another that is called the sherifs Tozne, and in euery manor is a court that is called a court Baron, and to euery faire & market is incident a Court that is called a court of Hipoorders. And though in some statutes is made mention sometime of the said Courts, yet neuerthelesse of the first institution of the said courts, & that such Courts should be, there is no statute nor law written in the lawes of England. And so all the ground and beginning of the sayd courts depend vpon the custome of the realme, the which custome is of so high authoritie, that the said courts ne their authorities may not be altered, ne their names changed without Parliament.

Also by the old custome of the Realme, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land, & this custome is confirmed by the statute of Magna charta cap. 26.

Also by the old custome of the Realme, all men great and small shall do & receiue Justice in the kings Courts, and this custome is confirmed by the statute of Marleb. ca. 1.

Also by the old custome of the Realme, the eldest sonne is onely heire to his Ancestoz, and if there be no sonnes but daughters, then all the daughters shall be heires. And so it is of sisters and other kinswomen. And if there be neither sonne, daughter, brother, nor sister, the shall the inheritance descend to the next kinsman or kinswoman of the whole blood to him that had the inheritance, of how many degrees soeuer they be from him. And if there be no heire generall nor speciall, then the land shall escheat to the Lord of whom the land is holden.

Also by the old custome of the realme, lands shall neuer ascend, or descend, from the sonne to the father or mother, nor to any other ancestoz in the right line, but it shall rather escheat to the Lord of the fee.

Also if any Alien haue a sonne that is an Alien, and after is made Denizen, and hath an other sonne, and after purchaseth lands & dyeth, the yongest son shall inherit as heire, and not the eldest.

Also if there be three brethren, & the nuddest brother purchase lands and dyeth without heire of his bodie, the eldest brother shall inherit

The 7. Chapter.

as heire to him, and not the yonger brother.

Also if land in fee simple descend to a mā by the part of his father, & he dieth without heire of his body, then the inheritance shall descend to the next heire of the part of his father. And if there be no such heire of the part of his father, then if the father purchaseth the lands, it shall go to the next heire of the fathers mother, & not to the next heire of the sonnes mother, but it shall rather cōcheat to the Lord of the fee. But if a mā purchase lands to him & to his heirs, & die without heire of his bodie, as is said before, then the land shall descend to the next heire of the part of his father, if there be any, & if not, then to the next heire of the part of his mother.

Also the sonne purchaseth lands in fee, and dyeth without heire of his body, the land shall descend to his uncle, and shall not ascend to his father: But if the father haue a sonne though it be many yeeres after the death of the elder brother, yet that sonne shall put out his uncle, and shall enjoy the land as heire to his elder brother for ever.

Also by the custome of the realme, the child that is borne before espousels is Bastard, and shall not inherit.

Also the custom of the realme is, that no manner of goods nor cattels real nor personal shall neuer go to the heire, but to the executors, or to the Ordinarie, or administrators.

Also the husband shall haue all the chattels personals that his wife had at the time of the espousels, or after, and also chattels real if hee ouerline his wife: But if he sell or giue away
the

the chattels reals & die, by that sale or gift the interest of the wife is determined, or els they shall remain to the wife if she ouerline her husband. Also the husband shall haue all the inheritance of his wife whercof he was seised in deed in the right of his wife during the espousels in fee, or in fee taile general, for terme of life, if he haue any child by her, to hold as tenant by the curtesie of England, & the wife shall haue the third part of the inheritance of her husband wherof he was seised in deed or in law after espousels &c. But in that case the wife at the death of her husband must be of the age of nine peres or aboue, or els she shall haue no dowry. D. What if the husband at his death be within the age of nine peres? S. I suppose she shall yet haue her dowry. Also the old law & Custome of the Realme is, that after the death of euery tenant that holdeth his land by knights seruiçe, the Lord shall haue the ward and marriage of the heir, til the heir come to the age of 21. peres, & if the heir in that case be of full age at the death of his ancestoz, the he shall pay to his lord his reliefe, which at the comon law was not certain, but by the stat. of Mag. ch. it is put in certain; that is to say, for euery whole knights fee to pay £.5. and for a whole Barony to pay a C. marks for reliefe, & for a whole Eriedom to pay a C. l. and after the rate. And if the heire of such a tenant be a woman, & she at the death of her ancestoz be within the age 9. xij. peres, then by the common law she should haue bin in ward only til 14. peres, but by the stat. of w. 1. in such case she shall be in ward till 16. peres.

And

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And if at the death of her auncestre she bee of the age of 14. yeres or above, she shal be out of ward though the land be holden of the king, & then she shall pay reliefe as an heire male shall.

Also of lands holden in Socage, if the auncestre die, his heire being within the age of 14. yeres, the next friend of the heire to whom the inheritance may not discēd shal haue the ward of his bodie and lands, till he shall come to the age of 14. yeres, and then hee may enter. And when the heire cometh to the age of xxj. yeres, then the gardein shal yeld him an accompt for the profits therof by him receued.

Also such an heire in socage for his reliefe shal double his rent to the Lord the yere following the death of his auncestre: As if his auncestre held by xj. d. rent, the heire in the yere following shall pay the xj. d. for his rent, and other xj. d. for his reliefe, and the relief he must pay though he be within age at the death of his auncestre.

Also there is an old Law and Custome in this Realme, that a freehold by way of feoffement, gift, or lease, passeth not without Livery of seisin be made vpon the lād according, though a deed of feoffement be therof made and deliuered: But by way of surrender, partition, and exchange, a freehold may passe without livery.

Also if a man make a Will of land wherof he is seised in his demesne as of fee, that Will is void: but if it had stōd in feoffers hand, it had bin good. And also in London such a Will is good by the custome of the city if it be inrolled.

Also a lease for term of yeres is but a chattel
by

by the law, and therfore it may passe without any liuery of seisin : but otherwise it is of a state for terme of life for that it is a freehold in the law, and therfore liuery must be made or els the freehold passeth not.

Also by the old Custome of the realme, a mā may distrain for a rent seruice of cōmon right. And also for a rent reserued vpo a gift in taile, a lease for terme of life, of yerres, & at will, & in such case the Lord may distreine the beasts of tenants, as sone as they come vpo the ground, but the beasts of strangers that come in but by maner of an escape, he may not distrein til they haue bin leuant & couchant vpon the ground: but for debt vpo an obligation, nor vpo a contract, nor for accompt ne yet for arrerages of accompt, nor for no maner of trespassse, reparations, nor such other, no man may distreine.

And by the old Custome of the realme al issues that shall be ioyned betwene partie and party in any court of record within the realme, except a few wherof it needeth not to treat at this time, must be tried by xij. free & lawfull mē of the visne that be not of affinitie to none of the parties. And in other courts that be not of record, as in the county, court baron, hundred & such other like, they shalbe tried by the Oth of the parties, & not otherwise, vnllesse the parties assent that it shall be tried by the homage. And it is to be noted that Lords, barons, & al piers of the realme be excepted out of such trials if they will, but if they will wilfully bee sworn therein, some say it is no error. And they may if they will haue a writ out of the chancery directed

The 7. Chapter.

rected to the shirife commanding him that hee shall not impanell them vpon no enquest.

And of this that is said befoze it appeareth that the customes aforesaid nor other like vnto them, whercof be very many in the lawes of England, cannot be proued to haue the strenght of a law only by reason. For how may it bee proued by reason that the eldest son shall onely inherite his father, and the yonger to haue no part, or that the husband shall haue the whole land for terme of his life as tenant by the curtesie in such manner as befoze appeareth, and that the wife shall haue onely the third part in the name of her dower, & that the husband shall haue al the goods of his wife as his owne, and that if hee die liuing the wife, that his executors shall haue the goods, and not the wife: all these and such other cannot be proued onely by reason that it should be so and no otherwise, although they be reasonable, and that with the custome therein vsed sufficeth in the Law, and a statute made against such generall customes ought to be obserued, because they be not merly the law of reason.

Also the law of proprietie is not the law of reason, but a law of custome, howbeit that it is kept, & is also right necessarie to be kept in all realmes & among all people, and so it may be numbred among the generall customes of the realme, & it is to vnderstand that there is no statute & treatise of the beginning of the said customs, ne why they should be hoide for law, and therefore after them that be learned in the lawes of the realme, the old custome of the realme

is the onely and sufficient authoritie to them in that behalfe, and I pray thee shew mee what Doctors hold therein, that is to say, whether a custome onely be a sufficient authoritie of any law. Do. Doctors hold that a law grounded vpon a custome is the most surest Law, but this thou must alwaies vnderstand therewith that such a custome is neither contrary to the law of reason, nor to the law of God. And now I pray thee shew me somewhat of the Maximes of the law of England, wherof thou hast made mention before in the 4. Chapter. Sin. I will with good will.

¶ Of the 4. ground of the law of England.

Cap. 8.

The 4. ground of the law of England standeth in diuers principles & bee called in the law Maximes, the which haue bin alwaies taken for law in this realm, so that it is not lawfull for any that is learned to deny the: for euerie one of those Maximes is sufficient authoritie to himselfe. And which is a Maximie, and which not, shall alway be determined by the Judges, and not by 12. men. And it needeth not to assigne any reason, why they were first receiued for Maximes, for it sufficeth that they be not against the law of reason, nor the law of God, & that they haue alway bin taken for a law. And such Maximes be not only holden for law, but also other cases like vnto the, and al things that necessarily follow vpon the same, are to be reduced to & like law, & therefore most commonly there be assigned some reasons or

con.

The 8. Chapter.

consideration why such Maximes be reasonable, to the intent that other cases like, may the more conueniently be applied to the. And they be of the same strength and effect in the law as Statutes be. And though the generall customs of the Realme, be the strength & warrant of the said Maximes, as they be of the generall customes of the realme, yet because the said generall customes be in maner knowne through the Realme, as well to them that be vnlearned as learned, and may lightly be had & knowne, and that with little studie: and the Maximes be only knowne in the Kings Courts, or among them that take great study in the Law of the Realme, and among few other persons. Therefore they bee set in this writing for seuerall grounds, and hee that listeth may so accompt them, or if hee will, hee may take them for no ground, after his pleasure. Of which Maximes I shall hereafter shew thee part.

First there is a Maxime, that Escuage vncertaine maketh knights seruice.

Also there is another Maxime, that Escuage certaine maketh socage.

Also that he that holdeth by Castell gard, holdeth by knights seruice, but he holdeth not by Escuage. And that he that holdeth by xx. s. to the gard of a castell, holdeth by socage.

Also there is a Maxime, that a Discent taketh away an entrie.

Also, that no Prescription in lands maketh a right.

Also, that a Prescription of rent and profits appender out of land, maketh a right.

Also that the limitation of a prescription generally taker, is from the time that no man's minde runneth to the contrarie.

Also that assignes may be made vpon lands giuen in fee, for terme of life, or for terme of yerres though no mention be made of assignes: and the same law is of a rent that is granted, but otherwise it is of a warranty and of a covenant.

Also that a condition to auoid a freehold cannot be pleaded without deed, but to auoid a gift of chattell it may bee pleaded without deed.

Also that a release or confirmation made by him that at the time of the release or confirmation made, had no right, is void in the law, though a right come to him after, except it bee with warrantie, and then it shall bar him of all right that hee shall haue after the warrantie made.

Also that a right or title of action that only dependeth in action, cannot be giuen nor granted to none other but only to the tenant of the ground, or to him that hath the reuerſion or remainder of the same.

Also that in an action of debt vpon a contract, the defendant may swage his law, but otherwise it is vpon a lease of lands for terme of yerres or at will.

Also if that any exigent in case of felony bee awarded against a man: he hath thereby forthwith forfeited his goods to the king.

Also if the sonne bee attainted in the life of the father, and after he purchaseth his charter

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of pardon of the king, and after the father dyeth : In this case the land shall escheat to the Lord of the fee, insomuch that though he haue a yonger brother, yet the land shall not discend to him: for by the attainder of the elder brother the blood is corrupt, and the father in law died without heire.

Also if an Abbot or Prior alien the lands of his house and dieth, in this case, though his successor haue right to the lands, yet he may not enter, but he must take his action that is appointed him by law.

Also, there is a Maxime in the law, that if a villaine purchase lands and the Lord enter, he shall enjoy the land as his owne: but if the villaine alien before the Lord enter, the alienation is good. And the same law is of goods.

Also, if a man steale goods to the value of twelue pence or aboue, it is felonie, and he shall dye for it. And if it be vnder the value of xij. pence, then it is but petite larcenie, and he shall not dye for it, but shall be otherwise punished after the discretion of the Judges, except it be taken from the Person : for if a man take any thing how little soeuer it bee, from a mans person feloniously, it is called robbery & he shall dye for it.

Also, he that is arraigned vpon an Inditement of felonie shall be admitted in fauour of life to challenge xxxij Jurors peremptori, but if hee challenge any aboue that number, the Law taketh him as one that hath refused the Law, because hee hath refused thre whole Equalls, and therefore hee shall dye: but
with

With cause he may challenge as many as he hath cause of challenge to. And further it is to be vnderstood, that such peremptorie challenge shal not be admitted in appeale, because it is at the suit of the partie.

Also, the land of euery man is in the law enclosed from other, though it lie in the open field. And therefore if a man do trespass therein, the law shall be *Quare clauum fregit*.

Also the rents, commons of pasture, of turebarry, reuerfions, remainders, nor such other things which lye not in manuell occupation, may not be giuen nor graunted to none other without writing.

Also that hee that recouereth debt or damages in the Kings Courts by such an action wherein a *Capias* lay in the Processe, may within a yeare after the recouerie, haue a *Capias ad satisfaciendum* to take the body of the defendant, and to commit him to prison till hee haue paid the debt and damages: but if there lay no *Capias* in the first action, then the plaintiffe shall haue no *Capias ad satisfaciendum*, but must take a *Fieri facias*, or an *Elegit* within the yeare, or a *Scire facias* after the yere, or within the yere if he will.

Also, if a release or confirmation bee made to him, that at the tyme of the release made, had nothing in the land &c. the release or confirmation is void, except in certaine cases, as to bouch, and certaine other which need not here to be remembred.

Also there is a Maxime in the law of England, that the King may disseise no man, nor
 C 4. that

The 8. Chapter.

that no man may disseise the king, ne pull any reuerſion or remainder out of him.

Also the kings excellencie is so high in the law, that no freehold may be giuen to the king, ne be deriued from him, but by matter of Record.

Also there was sometime a Maxime and a law in England, that no man should haue a writ of right, but by speciall suit to the king, & for a fine to be made in the Chauncery for it. But these Maximes be changed by the stat. of Magna charta cap. 16. where it is said thus. Nulli negabimus, nulli vendemus rectū vel iustitiam. And by the words Nulli negabimus, a man shall haue a writ of right of course in the Chauncerie without suing to the king for it. And by the words Nulli vendemus, he shall haue it without fine: & so many times the old Maximes of the law be chaunged by statutes. Also though it be reasonable, that for the manifold diuersities of actions that bee in the lawes of England, that there should bee diuersities of Proces, as in the real actions after one maner and in personall actions after another maner: Yet it cannot be proued merely by reason, that the same Proces ought to be had and none other: for by Statute it might be altered. And so the ground of the said Proces is to bee referred onely to the Maximes and Customs of the Realme.

And I haue shewed thee these Maximes before rehearsed, not to the intent to shew thee specially what is the cause of the law in them, for that would aske a great respite. But I haue

haue shewed them only, to the intent that thou mayst perceiue that the said Maximes & other like, may bee conueniently set for one of the grounds of the lawes of England. Moreover there be diuers cases, wherof I am in doubt whether they be onely Maximes of the law, or that they be grounded vpon the law of reason, wherein I pray thee let mee heare thine opinion.

Do. I pray thee shew those cases that thou meanest, and I shall make thee answer there in as I shall see cause.

Hereafter follow diuers cases, wherein the Student doubteth whether they be only Maximes of the Law, or that they be grounded vpon the Law of Reason.

Cap. 9.

The Law of England is, if a man command another to do a trespassse, & he doth it, that the commaunder is a trespasser.

And I am in doubt whether that it be onely by a Maxime of the law, or that it be by the law of reason.

Also, I am in doubt vpon what Law it is grounded, that the accessorie shall not be put to answer before the principall &c.

Also, the law is, that if an Abbot buy a thing that commeth to the vse of the house, & dyeth, that his successor shall be charged. And I am somewhat in doubt vpon what ground that

The 9. Chapter.

law dependeth.

Also, that he & hath possessiō of land though it be by disseisin, hath right against al men, but against him that hath right.

Also, that if an actiō reall be sued against any man that hath nothing in the thing demanded, the writ shall abate at the common law.

Also, that the alienation of the tenant hanging the writ, nor his entrie into religiō, or if he be made a knight, or if he bee a woman & take an husband hanging the writ, that the writ shall not abate

Also, if land & rent that is going out of the same land, come into one mans hand of like estate, and like succie of title, the rent is extinct.

Also, if land descend to him that hath right to the same land before, he shall bee reinuted to his better title if he will.

Also, if two titles bee concurrant together, that the eldest title shall be preferred.

Also, that euery man is bound to make recompence, for such hurt as his beasts shall do in the corne or grasse of his neighbour, though he know not that they were there.

Also, if the demandant or plainife hanging his writ, will enter into the thing demanded, his writ shall abate. And it is many times verie hard & of great difficultie to knowe what cases of the Law of England be grounded vpon the law of reason, and what vpon custome of the Realme, and though it bee hard to discusse it, it is very necessary to be knowne, for the knowledg of the perfect reason of the law;

law: If any man think that these cases before rehearsed be grounded vpon the law of reason, then he may refer them to the first ground of the law of England, which is the law of reason, wherof is made mention in the 5. chapter. And if any man thinke that they be grounded vpon the law of custome, then he may refer the to the Maxims of the law, which be assigned for the fourth ground of the Law of England, wherof mention is made in the 8. Cha. as before appeareth.

Do. But I pray thee shew me by what authority it is proued in the lawes of England, that the cases which thou hast put before in the viij. Chap. and such other which thou callest Maxims ought not to be denied, but ought to be taken as Maxims. For sith they cannot be proued by reason as thou agreeest thy selfe they cannot, they may as lightly bee denied as affirmed, vnlesse there be some sufficient authority to approue them.

Su. Many of the customes and Maxims of the Lawes of England bee knowne by the vse and the custome of the realme so apparantly that it needeth not to haue any Law written thereof. For what needeth it to haue any Law written that the eldest son shall inherite his father: or that all the daughters shall inherite together as one heire, if there bee no son: or that the husband shall haue the goods and chattels of his wife that she hath at the time of the espousels, or after: or that a bastard shall not inherite as heire: or the executors shall haue the disposition of all the goods of

The 10. Chapter.

their testator: and if there be no executors that the Ordinary shall haue it, & the heire shall not meddle with the goods of his auncester, but if any particuler customes help him.

The other Maximes & customs of the law that be not so openly knowne among the people may be knowne partly by the law of Reason and partly by the bookes of the laws of England called Yeares and Termes, and partly by diuers Records remaining in the R. Courts and in the Treasorie: and specially by a booke called the Register, & also by diuers Statutes, wherein many of the said Customes & Maximes be oft recited, as to a diligent Searcher, will euidently appeare.

¶ Of the fift ground of the Law of England.

Cap. 10.

The fift ground of the Law of England standeth in diuers particuler customs vsed in diuers counties, towns, cities, and Lordships in this realme, & which particuler customes, because they be not against the law of reason nor the law of God, though they bee against the said generall Customs or Maximes of the law, yet neuerthelesse they stand in effect and be taken for law: but if it rise in question in the kings courts, whether there be any such particuler custome or not, it shall bee tried by 12. men, and not by the iudges, except the same particuler custome bee of Record in the

the same Court. Of which particuler Customes, I haue hereafter noted some for an example.

First there is a custome in Kent that is called Gavelkind, that all the brethren shall inherite together, as sisters at the common Law.

Also there is an other particuler Custome, that is called Burghenglish, where the yonger son shall inherite before the eldest, and that custome is in Nottingham.

Also there is a custome in the Citie of London, that freemen there, may by their testamēt enrolled, bequeath their lands that they be setted of to whom they will, except to Mortmaine. And if they be citizens and freemen, that they may also bequeath their lands to Mortmaine.

Also in Gavelkind, though the father bee hanged, the son shall inherite. For their custome is, the Father to the bough, the Son to the plough.

Also in some Countries the wife shall haue the halfe of the husbands lands in the name of her dowry, as long as she liueth sole.

And in some countrie the husband shal haue the halfe of the inheritance of his wife, though he haue no issue by her.

Also in some Country an Infant when he is of age of xv. yeeres may make a feoffment, and the feoffment good. And in some Country when he can meat an elle of cloth.

¶ Of the sixt ground of the Law of
England.

Cap.

The 11. Chapter.

Cap. 11.

The first ground of the Law of England standeth in diuers statutes made by our Soueraigne Lord the kinge his progenitors, & by the Lords spirituall & temporall, and the Commons in diuers Parliaments, in such cases where the law of reason, the law of God, Customes, Maximes, ne other grounds of the law seemed not to be sufficient to punish euill men, and to reward good men. And I remember not, that I haue seene any other grounds of the Law of England, but onely these that I haue before remembred. Furthermore it appeareth of that I haue said before, that oft times two or thre grounds of the law of England must be ioyned together, or that the plaintife can open & declare his right, as it may appeare by this example. If a man enter into another mans land by force, and after maketh seoffment for maintnance to defraud the plaintife from his action: In this case it appeareth that the said vnlawfull entrie is prohibited by the Law of reason, but the plaintife shall recover treble damages, that is by reason of the statute made in the 8. yere of king H. 6. cap. 9. And that the damages shalbe celled by xij. m^l that is by the custome of the realme. And so in this case, thre grounds of the law of England maintaine the plaintifes action.

And so it is in diuers other cases that need not to be remembred now. And thus I make an end for this time, to speak any further of the grounds of the law of England. D. I thanke the

thee for the great paine that thou hast taken therein. Nevertheless, forasmuch as it appeareth that thou hast said before, that the learned men of the Law of England pretend to verifie, that the Law of England wil nothing do, ne attempt against the law of Reason, nor the Law of God, I pray thee aunswere mee to some Questions grounded vpon the Law of England, how as thou thinkest, the law may stand with reason or conscience in them.

St. But the case, and I shall make answere therein aswell as I can.

¶ The first question of the Doctor, of the law of England and conscience.

Cap. 12.

I haue heard say, that if a man that is bound in an Obligation pay the money, but hee taketh no acquittance, or if hee take one and it happeneth him to lose it, that in that case hee shall bee compelled by the Lawes of England to pay the money againe. And how may it bee said then, that that Law standeth with reason and conscience: for as it is grounded vpon the Law of Reason, that debts ought of right to be payed, so it is grounded vpon the Law of Reason (as mee seemeth) that when they bee payed, that hee that paid them should bee discharged. Stu. First thou must vnderstand, that it is not the Law of England, that if a man that is bound in an Obligation pay the money without Acquittance, or if hee

The 12. Chapter.

he take acquittance and leese it, that therefore the Law determineth that he ought of right to pay & money estlowes, for that law were both against reason and conscience. But though it is, that there is a general Maxime in the law of England, that in an action of debt sued by an Obligation, the defendant shall not plead that he oweth not the money, he can in no wise discharge himselfe in that action, but hee haue acquittance or some other writing sufficient in the law, or some other thing like, witnessing that he hath paid the money: that is ordained by the Law to auoid a great inconuenience that els might happen to come to many people: that is to say, that euery man by a Nude parol, and by a bare Auerrement should auoid an Obligation. Wherefore to auoid that inconuenience, the law hath ordained, that as the defendant is charged by a sufficient writing, that so hee must bee discharged by sufficient writing, or by some other thing of as high authoritie as the Obligation is. And though it may follow thereupon, that in some particular case a man by occasion of that generall Maxime may be compelled to pay the money againe that he paid before: Yet neuerthelesse, no default can be thereof assigned in the Law. For like as makers of law take heed to such things as may oft fall, & do most hurt among the people, rather than to particular cases: So in likewise the generall grounds of the law of England, heed more what is good for many, than what is good for one singular person only. And because it should bee a hurt to many,

if an Obligation should bee so lightly avoided by sword, therefore the law specially pꛛeuenteth that hurt vnder such maner as before appereth: and yet intendeth not, nor commaundeth not, that the money of right ought to bee paid againe, but setteth a generall rule which is good and necessary to all the people, & that every man may wel keep without it be thꛛough his owne default. And if such default happen in any person, whereby he is without remedie at the common law, yet he may bee holpen by a Subpena, and so hee may in many other cases where conscience serueth for him, that were too long to rehearse now.

Do. But I pray thee shew mee vnder what maner a man may be holpen by conscience. And whether he shall be holpen in the same court, or in another. Sr. Because it cannot bee well declared where a man shall bee holpen by conscience, & where not, but it be first knowne what conscience is, therefore because it pertaineth to thee most properly, to treat of the nature and qualitie of conscience, therefore I pray thee that thou wilt make me some briefe declaration of the nature and qualitie of conscience, & then I shall answer to thy question as well as I can. Do. I will with good will doe as thou saiest, & to the intent that thou maiest be better vnderstand that I shall say of conscience, I shall first shew thee what Sinceretis is, & then what reason is, & then what conscience is, and how these three differ among themselves, I shall somewhat touch.

¶ What

The 13. Chapter

¶ What Sinderelis is.

Cap. 13.

Sinderelis is a naturall power of þe soule, set in the highest part thereof, mouing & stirring it to good, & abhorring euill. And therefore Sinderelis neuer sinneth nor erreth. And this Sinderelis our Lord put in man to the intent that the order of things should bee obserued. For after Saint Dionise, the wisdom of God ioineth the beginning of the second things to the last of the first things: for Iungell is of a nature to vnderstand without searching of reason, and to that nature mā is ioined to Sinderelis, the which Sinderelis may not wholly be extincted neither in man, ne yet in damned soules. But neuerthelesse as to the vse and exercise thereof, it may bee let for a time, either through the darknesse of ignorance, or for vndiscreet delectation, or for the hardnesse of obstinacie. First by the darknesse of ignorance Sinderelis may be let, that it shall not murmur against euill, because hee beleueth euill to bee good, as it is in heretikes, the which, whē they dye for the wickednes of their error, beleue that they die for the verie truth of the faith. And by vndiscreet delectation, Sinderelis is sometime so overlaid, that remorse or grudge of conscience for that time can haue no place. For the hardnes of obstinacy Sinderelis is also let that it may not stirre to goodnesse, as it is in damned soules that bee so obstinat in euill, that

that they may neuer be inclined to good. And though Sinderesis may be said to that point extinct in damned soules, yet it may not bee said that it is fully extinct to all intents. For they alway murmur against the euill of the paine that they suffer for sin, and so it may not bee said that it is vniuersally, and to all intents, and to all times extinct: and this Sinderesis is the beginning of all things that may bee learned by speculation or studie, and ministreth the generall grounds and principles thereof: and also of all things that are to be done by man. An example of such things as may be learned by speculation appeareth thus: Sinderesis saith that euery whole thing is more than any one part of the same thing, & that is a sure ground that neuer faileth. And an example of things that are to be done, or not to be done: as where Sinderesis saith no euill is to be done, but that goodnesse is to be done and followed, and euill to be fled, and such other.

And therefore Sinderesis is called by some men, the Law of reason, for it ministreth the principles of the law of reason, the which be in euery man by nature, in that he is a reasonable creature.

¶ Of Reason.

Cap. 14.

When the first man Adam was created, hee receiued of God a double eye, that is
60

The 14. Chapter.

to say, an outward eye, whereby hee might see visible things, and know his bodily enemies and eschew them. And an inward eye, that is the eye of reason, whereby hee might see his spirituall enemies that fight against his soule and beware of them. And among al gifts that God gaue to man, this gift of reason is the most noblest, for therby man pccelleth all beasts, and is made like to the dignitie of angels, discerning troth from falshood, and euill from good. Wherefore hee goeth far from the effect that he was made to, when he taketh not heed to the truth, or when hee pferreth euill before god.

And therefore after Doctors, reason is the power of the soule, that discerneth betwene good and euill, and betwene good and better, comparing the other: the which also sheweth vertues, loueth god, and speth vices. And reason is called righteous and good, for it is confor[mable] to the will of G O D, and that the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor straight, but that is said culpable, is either because she is deceiued with an Error that might be overcome, or else through her pride or sloth, wille she enquireth not for knowledge of the truth that ought to be enquired. Also reason is diuided into two parts, that is to say, into the higher part and into the lower part.

The higher part lydeth heavenly things eternal, and reasoneth by heavenly Lawes or by heavenly reason what is to be done, & what

is not to be done, and what things God commaundeth, and what he prohibiteth. And this higher part of reason hath no regard to transitory things or temporall things, but that sometime as it were by maner of counsell, she bringeth forth heavenly reasons to order wel temporall things. The lower part of reason looketh most to gouerne wel temporall things, & she groundeth her reasons much vpon lawes of man, & vpon reason of man, wherby she concludeth that that is to be done, that is honest and expedient to the commonwealth, or not to be done, that is not expedient to the Commonwealth. And so that reason wherby I know God and such things as pertaine to God, belongeth to the highest part of reason. And the reason wherby I know creatures, belongeth to the lower part of reason. And though these two parts, that is to say, the higher part & the lower part be one in deed & essence, yet they differ by reason of their working, and of their office, as it is of one selfe eye, that sometime looketh bpward, and sometime downward.

¶ Of Conscience.

Cap. 15.

This word Conscience, which in latin is called *Cōscientia*, is compounded of this prepositiō cum, þis is to say in English, to, & of this nōwne *scientia*, þis is to say in English, knowledge, and so conscience is asmuch to say, as knowledge of one thing with another thing, & conscience so takē, is nothing els but

The 15. Chapter.

an applying of any sciēce or knowledg to some particular act of man. And so conscience may sometime erre, & sometime not erre. And of cōscience thus takē, doctozs make many descriptions, wherof one doctoꝝ saith, that conscience is the law of our vnderstāding. Another, that conscience is an habit of the mind discerning betwixt good & euill. Another, that cōscience is the iudgement of reason, iudging on the particular acts of mā:al which sayings agree in one effect (that is to say) that cōscience is an actual applying of any cūning or knowledg to such things as be to be done, whereupon it followeth, that byō the most perfit knowledg of any law or cūning, & of the most perfit & most true applying of the same to any particular act of man followeth h̄ most perfit, h̄ most pure, & the most best conscience. And if there be default in knowing of the truth of such a law, or in the applying of h̄ same to particular acts, thē therebyō followeth an error or default in cōscience, as it may appear by this exāple. Sinderelis missestreteth a vniuersall principle h̄ neuer erreth, (that is to say) h̄ an vnlawfull thing is not to be done. And thē it might be taken by some mā that euery oath is vnlawfull, because the Lord saith, Mat. 5. Ye shall in no wise sweare: And yet he h̄ by reason of the said words will hold that it is not lawfull in no case to sweare erreth in conscience, for he hath not the perfit knowledg and vnderstanding of the truth of the said gospel, nor he reduceth not the saying of scripture, to other scriptures, in which it is granted that in some case an oath may be lawfull, & the cause
why

Why conscience may so erre in the said case, & in other like, is because conscience is formed of a certain proposition or questiō grounded particularly vpon vniu^{er}sal rules ordeined for such things as are to be done. And because a particular proposition is not known to himself, but must appear & be searched by a diligēt search of a reason, therfore in search & in the cōscience it should be formed therupon may happē to bee error, & therupon it is said it there is error in conscience: which error cōmeth either because he doth not assent to it he ought to assent vnto, or els because his reasons wherby he doth refer one thing to another, is deceived. For further declaration wherof it is to vnderstand it error in cōscience cometh 7. manner of waies. First is through ignorance: & it is when a mā knoweth not what he ought to do, & then hee ought to aske counsel of thē it he thinketh most expert in the science, wherupon his doubt riseth. And if he can haue no counsel, thē he must wholly cōmit him to God, & he of his goodnes wil so order him, that he wil saue him frō offence. The second is through negligēce, as when a mā is negligent to search his owne conscience, or to enquire the truth of other. The 3. is through pride, as when he wil not meeken himselfe, ne beleue them that be better & wiser than he is. The fourth is through singularity as when a man folloiweth his owne wit, and wil not cōform himself to other, nor follow the good common waies of good men. The first is through an inordinat affection to himselfe wherby hee maketh conscience to follow his desire,

The 15. Chapter.

& so he causeth her go out of her right course.
 The 6. is through puslanimitie, wherby some
 persō dzedeth oft times such things as of rea-
 son he ought not to dread. The 7. is through
 perplexity, & this is when a mā beleueth him-
 self to be so set betwixt two sins, that he think-
 keth it vnpossible, but that hee shal fal into the
 one, but a mā can neuer be so perplexed in deed
 but through an erroz in conscience, & if he will
 put away that erroz he shall be deliuered: ther-
 fore I pray thee that thou wilt alwaies haue a
 good conscience, and if thou haue so, thou shalt
 alwaies be mery, & if thine owne heart reprove
 thee not, thou shalt alwaies haue inward peace.
 The gladnes of rightwise mē is of God & in
 God, & their ioy is alwaies in truth and good-
 nes. There be many diuersities of conscience,
 but there is none better than that, whereby a
 man truly knoweth himself. Many men know
 many great & high cūning things, & yet know
 not themselues, and truly he that knoweth not
 himselfe knoweth nothing wel. Also he hath a
 good & cleane conscience, that hath puritie and
 cleanes in his heart, truth in his word, & right-
 wisenes in his deed. And as a light is set in a
 lantern that al that is in the house may be seen
 therby, so almighty God hath set cōscience in
 the midst of euery reasonable soule as a light
 wherby he may discern & know what he ought
 to do, & what he ought not to do. Therfore for
 asmuch as it becometh thee to be occupied in
 such things as pertain to the law: It is neces-
 sarie that thou euer hold a pure & cleane consci-
 ence, specially in such things as cōcern restitu-
 tion;

tion: for the sin is not forgiven but if the thing that is wrongfully taken be restored. And I counsell thee also þ thou loue that is good, & fly that is euil, & that thou doe to another as thou wouldest should be done to thee, & that thou do nothing to other that thou wouldest not should be done to thee. That thou do nothing against truth, that thou liue peaceably with thy neighbor, and that thou do Justice to euery man as much as in thee is. And also that in euery general rule of the law, thou doe obserue & keepe equitie: & if thou do thus, I trust the light of the lanterne, þ is thy conscience, shall neuer be extincted. *Sc.* But I pray thee shew me what is that equitie þ thou hast spoken of before, & that thou wouldest that I should keepe. *D.* I will with god wil shew thee somewhat thereof.

¶ VVhat is Equitie.

Cap. 16.

Equitie is a rightwisenes that considereth al the particuler circumstances of the deed, the which also is tempered with the sweetness of mercy. And such an equitie must alwaies be obserued in euery law of man, & in euery general rule therof, & that know he well, that said thus, laws couet to be ruled by equitie. And the wise man saith, bee not ouermuch rightwise: for the extreme rightwisenes is extreme wrong, as who saith: if thou take al that the words of the law giueth thee, thou shalt sometime do against the law: & for the plainer declaration what equitie is, thou shalt vnderstand,

D 19,

that

The 6. Chapter.

that sith \bar{h} deeds & acts of men, for which lawes
 bin ordained, hapē in diuers maners infinitly:
 It is not possible to make any general rule of
 \bar{h} law, but \bar{h} it shal faile in some case, & therfore
 makers of lawes take heed to such things as
 may often come, & not to euery particuler case,
 for they could not though they would. And
 therfore to follow the words of \bar{h} law were in
 some case both against iustice & \bar{h} edmon wel h,
 wherfore in some cases it is necessary to leaue
 the words of the law, & to follow that reason &
 iustice requireth, & to that intent equity is or-
 demed: that is to say, to tēper and mitigate the
 rigor of the Law. And it is called also by some
 men Epicaia, the which is no other thing but
 an exception of the law of God or of the law of
 reason from the general rules of the law of mā,
 when they by reason of their generality would
 in any particuler case iudge against the law of
 God, or the law of reason, the which exception
 is secretly vnderstood in euery general rule of
 euery positue law. And so it appeareth that e-
 quity taketh not away the very right, but only
 that, that seemeth to be right by the generall
 words of \bar{h} law, nor it is not ordained against
 \bar{h} cruelnesse of the law, for the law in such case
 generally taken is good in himself, but equitie
 followeth \bar{h} law in all particuler cases where
 right and Justice requireth, notwithstanding
 that general rule of the law be to the contrary:
 wherfore it appeareth \bar{h} if any law were made
 by a man without any such exception expessed
 or implied, it were manifestly vnrasonable, &
 were not to be suffered: for such cases might
 come

come that he that would obserue \bar{y} law should
 breake both the law of God & the law of reason.
 As if a man make a vow that he wil neuer eat
 white meat, and after it happeneth him to come
 there where he can get no other meat. In this
 case it behoueth him to breake his auow, for \bar{y}
 particuler case is excepted secretly frō his ge-
 nerall auow by his equitie or Epicay, as it is
 said before. Also if a law were made in a Citie,
 that no man vnder the paine of death should o-
 pen the gates of the citie before the Summe ri-
 sing: yet if the citizens before that houre flying
 from their enemies come to the gates of the ci-
 ty, & one for sauing of the citizens openeth the
 gates before \bar{y} houre appointed by the law, yet
 he offendeth not the law, for that case is excep-
 ted from the said generall law by equitie, as is
 said before: & so it appeareth that equity rather
 folloiweth the intent of the law, thā \bar{y} words of
 the law. And I suppose \bar{y} there be in likewise
 some like equities grounded vpon the generall
 rules of the law of \bar{y} realm. S. Pe verely, wher-
 of one is this, there is a general prohibition in
 the laws of Englad, that it shal not be lawfull
 to any mā to enter into the freehold of another
 without authoritie of the owner or the Law:
 but yet it is excepted frō the said prohibitō by
 the law of reason, that if a man drive beasts by
 the high way, & the beasts happen to escape in-
 to the cozne of his neighbour, & he to bring out
 his beasts that they should doe no hurt, goeth
 into the ground, & fettereth out the beasts, there
 he shall iustifie that entere into the ground by
 the Law, Also notwithstanding the Statute

The 16. Chapter.

of Ed. 3. made the 14. yere of his raigne, where-
 by it is ordained, that no man vpon pain of im-
 prisonment should giue any almes to any bali-
 ant begger, that is well able to laboz: yet if a
 man meet with a valiant begger in so cold a
 weather and so light apparel, that if he haue no
 clothes he shal not be able to come to any towne
 to haue succour, but is likely rather to dye by
 the way, and he therfore giueth him apparel to
 saue his life, he shall be excused by the said sta-
 tute, by such an exception of the law of reason
 as I haue spoken of. Do. I know wel that as
 thou saist he shal be excepted of the said statute
 by conscience, & ouer that, he shall haue great
 reward of God for his good deed, but I would
 wit whether the party shalbe so discharged in
 the cōmon law, by such an exception of the law
 of reason, or not, for though ignorance vnuin-
 cible of a statute excuse the partie against god,
 yet (as I haue heard) it excuseth not in the
 lawes of the realme, ne yet Chancery, as some
 say, although the case be so that the partie to
 whome the forfeiture is giuen may not with
 conscience leane it. St. Merely, by thy question
 thou hast put me in a great doubt, wherfore I
 pray thee giue me a respite therein to make thee
 an answer, but as I suppose for h time (how-
 beit I will not fully affirme it to be as I say)
 it should seeme that he should well plead it for
 his discharge at the common Law, because it
 shall be taken that it was the intent of the ma-
 kers of the statute to except such cases. And h
 iudges may many times iudge after the mind
 of the makers as farre as the letter may suffer
 and

and so it seemeth they may in this case. And diuers other exceptions there be also from other general grounds of the law of the Realme by such equitie, as thou hast remembred before, that were too long to rehearse now. Doct. But yet I pray thee shew me shortly somewhat more of thy mind vnder what maner a man may bee holpen in this realme by such equitie. S. I will with good will shew thee somewhat therein.

¶ In what maner a man shall bee holpen by equitie in the lawes of England.

Cap. 17.

First it is to be vnderstood, there be in many cases diuers exceptions from þe general grounds of the law of the realme by other reasonable grounds of the same law, whereby a man shall be holpen in the common law. As it is of this general ground, that it is not lawfull for any man to enter vpon a Discent, yet the reasonableness of the Law excepteth from the ground, an Infant that hath right, & hath suffered such a Discent, & him also that maketh continuall claime, and suffereth them to enter, notwithstanding the discent. And of that exception they shal haue auantage in the cōmon law. And so it is likewise of diuers statutes, as of þe statute whereby it is prohibited, that certain particuler tenāts shal do no wast, yet if a lease for terme of yeres be made to an infant that is within yeres of discretion, as of the age of v. or vi. yeres, & a stranger do wast, in this case this

The 17. Chapter.

infant shall not be punished for the wast, for he is excepted & excused by the law of reason. And a woman couert to whom such a lease is made after the couerture, shall be also discharged of wast after her husbands death, by a reasonable Maxime & custome of the realme. And also for reparations to be made vpon the same ground it is lawfull for such particuler tenants to cut down trees vpon the same ground to make reparations. But the cause there as I suppose is, for that the mind of the makers of the sayd estatute, shal be take to be, that that case should be excepted. And in all these cases the parties shalbe hoipen in the same court, & by the cōmon Law, & thus it appeareth that sometime a mā may be excepted from the rigor of a Maxime of the law by another Maxime of the Law. And sometime from the rigor of a statute by the law of reason, & sometime by the intent of the makers of y^e statute: but yet it is to be vnderstand that most cōmonly, where any thing is excepted from the generall customs or Maximes of the Laws of the Realme by the law of reason, the party must haue his remedy by a writ that is called Subpena, if a Subpena lyeth in the case. But where a Subpena lyeth, & where not, it is not our intent to treat of at this time. And in some case there is no remedy for such an equity by way of compulsion, but all remedie therein must be cōmitted to the consciēce of the party. Doct. But in case where a subpena lyeth, to whom shal it be directed, whether to y^e Judge, or the party. sc. It shal neuer be directed to the Judge, but to the partie plaintife or to his attourney.

journey, and thereupon an Iniunction commanding them by the same vnder a certaine pain therein to be contained, that he proceed no further at the common Law, til it be determined in the Kings Chauncerie, whether the plaintife hath title in conscience to recouer, or not. And when the plaintife by reason of such an Iniunction ceaseth to aske any farther proceſſe. The Judges will in like wise cease to make any further proceſſe in that behalfe.

Do Is there any mention made in the law of England of any such equities. *Sir.* Of this terme Equitie to the intent that is spoken of here, there is no mention made in the law of England, but of an Equity deriued vpon certaine statutes, mention is made many times & often in the Law of England: But that equity is al of another effect than this is. But of the effect of this Equitie that wee now speake of, mention is made many times: for it is oftentimes argued in the Law of England, where a Sub pena lyeth, and where not, and daily Wills be made by men learned in the Law of this Realme, to haue Sub penas. And it is not prohibited by the Law, but that they may well doe it, so that they make them not, but in case where they ought to be made, and not for vexation of the partie, but according to the truth of the matter. And the Law will in many cases that there shall be such remedie in the Chauncery vpon diuers things grounded vpon such Equities, and then the Lord Chancellour must order his conscience after the rules and grounds of the Law of the realme,

to

The 18. Chapter.

insomuch that it had not bin inconuenient to haue assigned such remedie in the Chauncerie vpon such equities for the seuenth ground of the Law of Englad: but for asmuch as no record remaineth in the kings Court of no such bill, ne of the writ of sub pena or Ininactio, that is sued thereupon, therefore it is not set as for a speciall ground of the law, but as a thing that is suffered by the law. D. Then sith the parties ought of right in many cases to bee holpen in the Chauncery vpon such equities: It seemeth that if it were ordained by Statute, that there should be no remedie vpon such equities in the Chauncerie, nor in none other place, but that euery matter should bee ordered onely by the rules and grounds of the common Law, that the statute were against right and conscience. Sr. I think the same, but I suppose there is no such statute. Do. There is a statute of that effect, as I haue heard say, wherein I would gladly heare thy opinion. Sen. Shew mee that statute and I shall with good will say as mee thinketh therein.

¶ Whether the Statute hereafter rehearsed by the Doctor, be against conscience or not.

Cap. 18.

There is a Statut made in the 4. yere of R. H. 4. cap. 22. whereby it is enacted, that iudgement giuen by the kings courts, shal not be examined in the Chancery, Parliament, nor

nor elsewhere, by which Statute it appeareth that if any Iudgement be giuen in the Kings courts against an equity or against any matter of conscience, that there can be had no remedie by that equitie, for the iudgement cannot be reformed without examination, and the examination is by the said Statute prohibited, wherefore it seemeth that the said Statute is against conscience: what is thine opinion therein?

Sr. If iudgement giuen in the kings courts should be examined in the Chancery before the kings counsell, or any other place, the plain- tifes or demandants should seldome come to the effect of their suit, ne the law should neuer haue end. And therefore to eschew that incon- uenience that Statute was made. And though peraduenture by reason of that Stat. some sin- gular person may happen to haue losse: Neuer- thelesse the said Statute is very necessary, to es- chew many great vexations and vniust ex- pences, that would else come to many plain- tifes that haue rightwisely recovered in the kings Courts. And it is much more prouided for in the law of Englad that hurt nor dama- ges should not come to many, than only to one. And also the said Statut doth not prohibit equi- ty, but it prohibiteth only the examination of the iudgement for the eschewing of the incon- uenience before rehearsed. And it seemeth that the said Statut standeth with godd conscience: For in many other cases where a man doth wrong yet he shal not be compelled by way of compulsi- on to reforme it, for many times it must be left to the conscience of the party, whether he wil re- dresse

The 18. Chapter.

redresse it or not. And in such case hee is in conscience aswel bound to redresse it if he will saue his soule, as he were if hee were compellable therto by the law, as it may appeare in diuers cases that may be put vpon the same ground. D. I pray thee put some of these cases for an example. Sen. If the defendant wage his law in an action of debt brought vpon a true debt, the plaintiff hath no means to come to his debt by way of compulsion, neither by sub pena, nor other wise, & yet the defendat is bound in conscience to pay him. Also if the grand Jury in a taint affirme a false verdict giuen by the petite Jurie, there is no further remedie but the Conscience of the partie. Also where there can be had no sufficient prooue, there can bee no remedie in the Chancery, no more than there may be in the spiritnall Court. And because thou hast giuen an occasion to speake of conscience I would gladly heare thy opinion where conscience shalbe ruled after the Law, & where the law shalbe ruled after conscience. D. And of that matter I would likewise gladly hear thy opinion, specially in cases grounded vpon the lawes of England, for I haue not heard but little thereof in time past, but before thou put any case thereof: I would that thou wouldest shew me how these two questions after thy opinion are to be vnderstood.

¶ Of what Law this question is to bee vnderstood: that is to say, where conscience shal be ruled after the Law.

Cap. 19.

The

The law wherof mention is made in this question, that is to say: where conscience shalbe ruled by the law, is not as me seemeth to be vnderstood only of the law of reason, & of the law of god, but also of the law of mā, & is not contrarie to the law of Reason, nor the law of God, but & it is superadded vnto them for the better ordering of the commonwealth: for such a law of man is alwaies to be set as a rule in conscience, so that it is not lawfull for a man to frame it on the one side, ne on thother, for such a law of mā hath not only the strength of mans law, but also the Law of Reason, or of the Law of God, whereof it is deriued: for Lawes made by man, which haue receiued of God power to make Lawes, be made by God. And therfore conscience must be ordered by & law, as it must be vpon the law of God, & vpon the law of reason. And furthermore the Law wherof mention is made in & latter end of the Chapter next before, that is to say, in the question wherein it is asked where the Law is to be left & forsake for conscience, is not to be vnderstood of the law of reason, nor of the law of God: for the two lawes may not be left, nor it is not to be vnderstood of the law of man, that is made in particuler cases, and that is consonant to the law of reason, & to the law of God, and that yet that law should bee left for conscience: for of such a law made by man, conscience must be ruled, as it is said before: nor it is not to be vnderstood of a law made by mā cōmanding or prohibiting any thing to bee done that is against the law of reason, or the law of god.

¶ For

The 19. Chapter.

For if any law made by man, bind any person any thing that is against the said laws, it is no law, but a corruption and a manifest error. Therefore after them that be learned in the laws of England, the said question, that is to say, where the law is to be left for conscience, and where not, is to be understood in diuers manners, and after diuers rules, as hereafter shall somewhat be touched.

First, many vnlearned persons beleeue that it is lawfull for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the law, though the law doth not warrant them to do that they do, but onely when it is done, doth not for some reasonable consideration punish the that doth it, but leaueth it onely to his conscience. And therefore many persons do oft times that they should not do, & keepe as their owne that, that in conscience they ought to restore. Wherefore there is the lawes of England in this case.

If two men haue a wood ioyntly, & the one of them selleth the wood, and kepeth all the money wholly to himselfe: In this case his fellow shall haue no remedy against him by law, for as they when they tooke the wood ioyntly, put each other in trust, and were content to occupie together: so the Law suffereth them to order the profits thereof according to the trust that each of them put thother in. And yet if one tooke all the profits, he is bound in conscience to restore the halfe to his fellow, for, as the Law giueth him right only to halfe the land, so it giueth him right onely in conscience

science to the halfe profits. And yet neuertheless it cannot be said in that case, that the law is against conscience, for the law neither wil-
leth ne cōmandeth that one should take all the profits, but leaueth it to their conscience. so that no default can be found in the law, but in him that taketh all the profits to himselfe may be assigned default, which is bound in cōscience to reforme it, if he will saue his soule, though he cannot be compelled therto by the law. And therefore in this case & other like, that opinion which some haue, that they may do with cōscience, all that they shall not be punished for by the law if they do it, it is to bee left for conscience: but the Law is not to be left for conscience.

Also many men think that if a man haue land that another hath title to, if he hath the right shall not by the action that is giuen him by the law to recouer his right by, recouer damages, that then he that hath the land is also discharged of damages in conscience, & that is a great error in conscience: for though he cannot be compelled to yeeld the damages by no mans law, yet he is compelled thereto by the law of reason, & by the law of God, wherby we be bound to do as wee would be done to, and that wee should not couet our neighbors goods: & therefore if tenant in taile be disseised and the disseisor dyeth seised, and then the heire in the taile bringeth a Formedō & recouereth the land & no damages, for the law giueth him no damage in that case, yet the tenant by conscience is bound to yeeld damages to the heire in taile from the
 death

The 19. Chapter.

death of his auncester. Also it is taken by some men, that the law must bee left for conscience, where the law doth not suffer a man to deny & he hath before affirmed in court of Record, or for that he hath wilfully excluded himself thereof for some other cause: as if the daughter that is only heir to her father, will sue liuery with her sister that is a bastard, in that case she shall not bee after receiued to say, that her sister is a bastard, in so much that if her sister take halfe the land with her, there is no remedie against her by the law. And no more there is of diuersitie in other estopples, which were too long to rehearse now. And yet the party that may take auantage of such an estoppel by the law is bound in conscience to forsake that aduantage, specially if he were so estopped by ignorance, & not by his own knowledge & assent. For though the law in such cases giueth no remedie to him that is estopped, yet the law iudgeth not that the other hath right vnto the thing that is in variance betwixt them. And it is to be vnderstood & the law is to be left for conscience, where a thing is tryed and found by verdict against the truth, for in the common law the iudgement must be giuen according as it is pleaded and tried, like as it is in other laws, that the iudgement must be giuen according to that, that is pleaded & proved. And it is to bee vnderstood that the law is to be left for conscience, where the cause of the law doth cease, for when the cause of the law doth cease, the law also doth cease in conscience, as appeareth by this case hereafter following.

A man maketh a lease for terme of life, & after
 a stranger doth wast, wherefore the lessee bring-
 geth an action of Trespass, & hath iudgement to
 recouer damages, hauing regard to the treble
 damages that he shal pay to him in the reuer-
 sion. And after he in the reversion before acti-
 on of wast sued, dieth, so that the action of wast is
 thereby extinted: then the tenant for terme of
 life (though hee may sue execution of the sayd
 iudgement by the law) yet he may not do it by
 conscience, for in conscience hee may take no
 more thā he is hurted by the said Trespass, be-
 cause hee is not charged ouer with 3 treble da-
 mages to his lessor. Also it is to be vnderstood
 where a law is grounded vpon a presumptiō,
 if the presumption be vnttrue, then the Law is
 not to be holden in cōscience. And now I haue
 shewed thee somewhat of the question, that
 is to say, where the law shalbe ruled after con-
 science. I pray thee shew me whether there bee
 not like diuersities in other laws, betwixt law
 & conscience. D. Yes verily, very many, wherof
 thou hast recited one before, where a thing that
 is vnttrue is pleaded, and proued, in which case
 iudgement must be giuen according, as well in
 the law Ciuill, as in law Canon. And an o-
 ther case is, that if the heire make not his In-
 uentory, he shall be bound after the law Ciuill
 to all the debts, though the goods amount not
 to so much. And the law Canon is not against
 that Law, and yet in conscience the heire
 which in the lawes of England is called an
 Executour is not in that case charged to the
 debts, but according to the value of the goods.

The 20. Chapter.

And now I pray thee shew mee some cases, where conscience shall bee ruled after the law. S. I wil with good wil shew thee somewhat as me thinketh therein.

¶ Here follow diuers cases; where conscience is to be ordered after the law.

Cap. 20.

The eldest sonne shall haue & inioy his fathers lands at the cōmon law in conscience, as he shal in \bar{h} law. And in Burgh english the yonger son shal inioy the inheritance, & that in conscience. And in Gauckind all the sons shall inherit the land together as daughters, at the cōmon law & \bar{h} in conscience. And there cā be none other cause assigned why cōscience in the first case is with the eldest brother, & in the second with the yonger brother, & in the 3. case with al the brethren, but because \bar{h} law of England by reason of diuers customes doth somtime giue the land wholy to the eldest sonne, sometime to \bar{h} yongest, & sometime to al. Also if a man of his mere motion make a feofment of two acres of lād, lying in two seueral shires, & maketh livery of seisin in the one acre in the name of both. In this case the feoffee hath right but only in the acre wherof luerie of seison was made, because he hath no title by the law: but if both acres had bin in one shire he had had good right to both. And in these cases the diuersity of the law maketh the diuersity of conscience.

Also

Also, if a man of his meer motiō make a fesse-
ment of a Manor, & saith not, to haue & to hold
etc. with the appurtenāces, in that case the les-
see hath right to the demesne lands, and to the
rents, if there be atturnements, & to the cōmen
pertaining to the Manor, but hee hath nei-
ther right to the aduowsons appendant, if any
be, nor to his villeins regardāt, but if this terme,
with thappurtenances, had bin in the deed, the
feoffee had right in conscience as well to the ad-
uowsons and villeins, as to the residue of the
Manor: but if the king of his meer motiō giue
a Manor with thappurtenances, yet the donee
hath neither right in law nor conscience to the
aduowsons nor villeins. And the diuersity of
the law in these cases make the diuersitie of
conscience.

Also, if a man make a lease for terme of yeres
payding to him & to his heirs a certain rēt bp-
on condition, that if the rent bee behind by xl.
daies etc. that then it shalbe lawfull to the lessor
& his heirs to recenter: And after the rent is be-
hind, the lessor asketh the rent according to the
law, & it is not payed, the lessor dyeth, his heire
entirely. In this case his entry is lawfull both
in law and conscience, but if the lessor had died
before he had demanded the rent, and his heire
demanded the rent, & because it is not paid he
recentereth, in that case his recenterie is not law-
full neither in law nor conscience.

Also, if the tenāt in dower sow her land & die
before the corne is ripe, the corne in conscience
belongeth to her executors, & not to him in the
reuerſion: but otherwise it is in conscience of

The 20. Chapter.

grasse and fruits. And the diuersitie of the law maketh there also the diuersitie in conscience.

Also, if a man seised of lands in his demesne, as of fee, bequeath the same by his last will to another, & to his heires, & dieth: In this case his heire notwithstanding the will, hath right to the land in conscience. And the reason is, because the law iudgeth that will to be void, & as it is void in the law, so is it void in conscience.

Also, if a man grant a rent for terme of life, & make a lease of land to his same grante for terme of life, & the tenant alieneth both in fee: In this case he in the reuerſion hath good title to the land both in law and conscience, and not to the rent. And the reason is, because the land by the Alienation is forfeit by the law to him in the reuerſion, and not the rent.

Also, if lands be given to two men and to a woman in fee, & after one of the men entermarrieth with the woman, and alieneth the land & dyeth: In this case the woman hath right but onely to the third part, but if the man & the woman had been married together, before the first feoffement, then the woman notwithstanding the alienation of her husband, should haue had right in law & conscience to the one halfe of the land. And so in these two cases conscience doth follow the Law of the Realme. Also if a man haue two sonnes, one before espouseis, and an other after espouseis, and after the father dieth seised of certaine lands: In this case his younger sonne shall enjoy the lands in this Realme, as heire to his father both in law and conscience. And the cause is, because that sonne boyn after
espou=

espousals, is by the Law of this realm the be-
 ry heire, and the elder son is a bastard And of
 these cases and many other like in the lawes of
 England may be foꝛmed the Silogisme of con-
 science, oꝛ the true iudgement of conscience in
 this maner. Sinderelis ministreth the Maior
 thus: rightwisenes is to be done to euery mā,
 vpon which Maior the law of England mi-
 nistreth the Minor thus: The inheritance be-
 longeth to the son boꝛn after espousels, & not
 the son boꝛne befoꝛe espousels, then conscience
 maketh the conclusion, & saith: therfoꝛe the in-
 heritance is in cōscience to be giuen to the son
 boꝛne after espousels. And so in other cases in-
 finit may be foꝛmed by the law of the Silogisme
 oꝛ the right iudgement of cōscience: wherfoꝛe
 they that be learned in the law of the realm, say
 that in euery case, where any law is ordeined
 foꝛ the dispositiō of lāds & goods, which is not
 against the law of god, noꝛ yet against the law
 of reason, that the law bindeth al thē that bee
 vnder the law of the Court of conscience, that
 is to say, inwardly in his soule. And therfoꝛe
 it is somewhat to maruell that spirituall men
 haue not indeuored themselves in tyme past to
 haue moze knowledge of the kings lawes than
 they haue done, oꝛ that they yet doe: foꝛ by the
 ignorance therof they be oft times ignorant of
 that that should order thē accordyng to right &
 Justice, as well concerning themselves as o-
 ther that come to them foꝛ Counsaile. And
 now foꝛasmuch as I haue answered to
 thy questions as well as I can: I pray thee
 that thou wilt shew mee thy opinion in diuers
 cases

The 21. Chapter.

cases formed vpon the law of England wher-
in I am in doubt, what is to be holden therein
in conscience. D. Shew me the questions & I
will say as me thinketh therein.

¶ The first question of the Student.

Cap. 21.

If any infant that is of the age of xx. yerres, &
hath reason and wilddome to gouern himself
felicly his lãd, & with the money therof buy-
eth other land of greater value than the first
was and taketh the profits thereof, whether
may the infant aske his first land again in cõ-
science, as he may by the law. D. what thinkest
thou in that question? S. Wee seemeth that loz-
as much as the law of England in this article
is grounded vpon a presumption, that is to say,
that infants commonly afore they be of the age
of xxj. yerres be not able to gouern themselves,
that yet forasmuch as that presumption say-
leth in this infant, that he may not in this case
with conscience aske the land againe, that hee
hath sold to his great aduantage, as before ap-
peareth. D. Is not this sale of the infant & the
seffement made therupon, if any were, voidable
in the law? S. Yes verely. D. And if the ses-
see haue no right by the bargain, nor by the
seffement made therupon, wherby should hee
then haue right thereto as thou thinkest. S. By
conscience as me thinketh, for the reason that
I haue made before. D. And vpon what law
should that conscience be grounded, that thou
spea-

speakest of, for it cannot be granted by the law
 of the Realme, as thou hast said thy selfe. And
 me thinketh that it cannot be groundd vpon
 the law of God, nor vpon the Law of reason,
 for scoffements nor contracts be not groundd
 vpon neither of those lawes, but vpon the law
 of man. So After the Law of property was or-
 deined, the people might not conueniently liue
 together without contracts, & therefore it see-
 meth that contracts be groundd vpon the law
 of reason, or at the least, vpon the law that is
 call *iur gentium*. Do. Though contracts bee
 groundd vpon the law that is called *iur*
gentium, because they be so necessary, & so ge-
 nerall among all people, yet that proueth not
 that contracts bee groundd vpon the law of
 reason: for though the law called *iur gentium*
 be much necessarie for the people, yet it may be
 chaunged. And therefore if it were ordeined by
 statute that there should be no sale of land, ne
 no contract of goods, and if any were, that it
 should be void, so that euery man should con-
 tinue still seised of his lands and possessed of
 his goods, the statute were good. And then if
 a man against that statute sold his land for a
 sum of money, yet the seiler might lawfully
 retaine his land according to the statute. And
 then he were bound to no more but to repay the
 money that he receiued with reasonable expen-
 ces in that behalf. And so in likewise me thin-
 keth that in this case the infant may with good
 conscience reuer into his first land: because
 the contract after the Maximes of the law of
 the Realme is void, for as I haue heard the
 Maximes

The 22. Chapter.

Maxims of the law be of as great strength in the Law as statutes. And some thinke that in this case the infant is bound to no more, but only to repay the money to him that he sold his land vnto, with such reasonable costs & charges as he hath sustained by reason of the same. But if a man sel his land by a sufficiēt & lawfull contract, though there lack euery of seisin or such other solemnities of the law, yet the seller is bound in conscience to performe the contract. But in this case the cōtract is insufficient, and so me thinketh great diuersity betwixt the cases, Sen. For this tyme I hold me contented with thy opinion.

¶ The second question of the Student.

Cap. 22.

If a man that hath lands for terme of life, be impanelled vpon an Inquest, & therupō leueth issues & dyeth, whether may those issues be leued vpon him in the reuersion in cōsciēce as they may be by the law? D. If they may be leued by the law, what is the cause why thou dost doubt whether they may be leued by conscience. S. For there is a Maxime in the laws of Englād, that where two Titles run together, the eldest title shall be preferred. And in this case the title of him in the reuersion, is before the title of the forfeiture of the issues. And therefore I doubt somewhat whether they may bee lawfully leued. No. By that reason it seemeth thou art in doubt what the law is in this case,

case, but that must necessarily bee knowne, for
els it were in vaine to argue what conscience
wil therein. S. It is certain that h law is such,
e so it is likewise if the husband forseit issues,
and die, those issues shall be leued on the lands
of the wife, D. And if the law be such, it seemeth
that conscience is so in likewise, for sith it is
the law, that for execution of iustice euery man
shall be impanelled when need requireth, it see-
meth reasonable, that if he wil not appear, that
he should haue some punishment for his not ap-
parance, for els the law should be clerely fru-
strate in that point. And the paine, as I haue
heard, is, that he shal lose issues to the king for
his not apparance: wherefore it seemeth not
inconuenient nor against conscience, though the
law be, that those issues shalbe leued of him in
the reuerfion, for that the condition was secret-
ly vnderstood in the law, to passe with the lease
when the lease was made. And therefore it is
for the lessor to beware & to prevent the danger
at the making of the lease, or els it shall be ad-
iudged his owne default. And then this parti-
cular Maxime whereby such issues shall be le-
ued vpon him in the reuerfion, is a particuler
exception in the law of England from the ge-
nerall Maxime that thou hast remembred be-
fore, that is to say, h where two titles run to-
gether, that the eldest title shalbe preferred, & so
in this case the general Maxime in this point
shall hold no place, neither in law, nor in consci-
ence, for by this particuler Maxime h strenght
of h general Maxime is restrained to euery in-
tent, h is to say, as well in law as in conscience.

The

The 23. Chapter.

The third question of the Student.

Cap. 23.

If a Tenant for terme of life, or for terme of
yeres, do wast, wherby they be bound by the
lawes to payd to him in þ reuerſiõ treble da=
mages, & so ſhal forfeit the place waſted, whe=
ther is he alſo bound in conſcience to pay thoſe
damages, & to reſtore that place waſted imme=
diatly after the waſt done, as he is in the ſingle
damages, or that hee is not bound thereto till
the treble damages, & place waſted, be recou=
red in the kings Court. D. Before iudgement
giuen in the treble damages & of the place wa=
ſted, he is not bound in conſcience to pay them,
for it is vncertaine what he ſhould pay: But it
ſufficeth that he be readie till iudgement be gi=
uen to payd damages according to the value of
the waſt, but after the iudgement giuen, hee is
bound in conſcience to payd the treble dama=
ges, & alſo the place waſted. And the ſame law
is in all ſtatutes Penal, that is to ſay, that no
man is bound in conſcience to pay the penalty
till it be recouered by the law. S. Whether may
he that hath offended againſt ſuch a ſtatute pe=
nal, defend the action and hinder the iudgemēt,
to the intent hee ſhould not pay the penaltie,
but onely ſingle damages. D. If the action bee
taken rightwiſely according to the Statute,
and vpon a iuſt cauſe, the defendant may in no
wiſe defend the action, vneſſe hee haue a true
dilatorie matter to plead, which ſhould bee
hurtfull to him if he pleaded not, though he bee
not

not bound to pay the penaltie till it bee recou-
red.

The fourth question of the
Student.

Cap. 24.

If a man enfeoffe o'her in certain land vpon
conditio, that if he enfeoffe any other, that it
shalbe lawfull for h' feoffor & his heirs to re-
enter, &c. Whether is this conditio good in co-
science, though it be void in the law? D. What
is the cause why this conditio is void in the
law? S. The cause is this, by the law it is inci-
dent to euery state of fee simple, that he h' hath
the estate, may lawfully by the law, and by the
gift of the feoffor, make a lease thereof:
And then when h' feoffor restraineth him after,
that he shall make no lease to no man a-
gainst his owne former graunt, & also against
the purtie of the state of a fee simple, the law
iudgeth the conditio to be void, but if the con-
ditio had bin, that hee should not haue enfeof-
fed such a man, or such a man, that conditio
had bin good, for yet he might enfeoffe other.

D. Though the said conditio be against the
effect of the state of a fee simple, & also against
the law: neuerthelesse it is not against the in-
tent that the parties agreed vpon, & that at the
time of the liuery. And forasmuch as the intent
of the parties was, h' if the feoffee infefted any
man of the land, that the feoffor should enter,
and to that intent the feoffee tooke the state &
after

The 24. Chapter.

after brake the intent, it seemeth that the lād in conscience should returne to the feoffor. **S.** The intent of the parties in the lawes of England is void in many cases, that is to say, if it be not ordered according to the law. And if a mā of his mere motion without any recompence, intending to giue lands to another, & to his heires, make a deed vnto him, whereby he giueth him those lāds, to haue and to hold to him for euer, intending that by the word (for euer) the lessee should haue the land to him & to his heires, in this case his intent is void, and the other shall haue the land onely for terme of life. Also if a man giue lands to another, & to his heires for terme of xx. yeares, intending, that if the lessee die within the terme, that then his heires should enioy the land during the terme: In this case his intent is void, for by the law of the realme al chattels real & personal shal go to the executors, & not to the heir. Also if a man giue lands to a man and to his wife, & to the third person, intending that euery of them should take the third part of the land as thre cōmon persons should, his intent is void, for the husband and the wife, as one person in the law, shal take onely the one halfe, & the third person the other halfe: but these cases be alway to be vnderstood wher the said estates bee made without any recompence. And forasmuch as in this principal case the intent of the feoffor is groundes against the Law, and that there is no recompence appointed for the feoffement, mee thinketh that the feoffor hath neither right to the land by Law or conscience: for if he should haue it by

con=

conscience, that conscience should be grounded vpon the law of reason, and that it cannot, for conditions be not grounded vpon the Law of reason, but vpon h Maximes & customs of the realme: & therefore it might be ordeined by statute that al conditions made vpon land should be void. And when a condition is void by the Maximes of the law, it is as fully void to euery intent, as if it were made void by statut, and so me thinketh that in this case the scoffor hath no right to the land in law nor in conscience D. I am content thy opinion stand til we shall haue hereafter a better leasure to speake farther in this matter.

¶ The fift question of the Student.

Cap. 25.

If a fine with proclamation be leued according to the statute, & no claime made within 5. years &c. whether is the right of a stranger extincted therby in conscience, as it is in the law. Do. Upon what consideration was that statut made: St. That the right of lands and tenemētis might be the moze certainly known, and not to be so vncertaine as they were before that statut. D. And when any law of man is made for a Common wealth, or for a good peace and quietnesse of h people, or for any incōuenience or hurt to be saued from them, that law is good, though per case it extinct the right of a stranger, and must be kept in the Court of
con-

The 25. Chapter.

conscience: for as it is said before in Ch. 4. By lawes rightwisely made by man, it appeareth who hath right to the lands & goods, for whatsoeuer a man hath by such a law he hath it rightwisely. And whatsoeuer he holdeth against such a law he holdeth vnrightwisely: & furthermore it is said there, all the lawes made by man which be not contrary to the lawe of God must be obserued & kept, and that in conscience. And he that despiseth the despiseth god, and he that resisteth them, resisteth God. Also it is to be vnderstood, that possessions & right thereof is subiect to the lawes, so that they therefore with a cause reasonable may be translated and altered from one man to another, by the act of the law. And of this consideration that law is grounded, that by a contract made in faires and markets, the property is altered, except the proprietie be to the King, so that the buyer pay, or do such other things as is accustomed there to be done vpon such contracts, and that the buyer knoweth not the former property. And in the law & till there is a like law, that if a man haue another mans good with a title three yeeres, thinking that he hath right to it, he hath & very right onto the thing: and that was made for a law, to the intēt that the proprietie and right of things should not be vncertaine, and that variance & strife should not be among the people. And forasmuch as the said statute was ordained to giue a certaintie of title in the lands and tenements comprised in the fine: It seemeth that that fine extinguisht the title of all other, aswell in con-

conscience as it doth in the law. And sith I haue answered to thy question, I pray thee let me know thy mind in one question concerning tailed lands, and then I will trouble thee no further at this time.

- ¶ A question made by the Doctor, how certain recoveries that be vsed in the kings Courts so defeat tailed land, may stand with conscience.

Cap. 26.

I haue heard say, & when a man that is seiled of lands in the taile, selleth the land. That it is commonly vsed, that he that buyeth the land, shall for his suertie, and for the auoyding of the Taile in that behalfe, cause some of his friends to recouer the said lands against the said tenant in taile: which recovery, as I haue bene credibly enformed, shall be had in this manner: the demaundants shall suppose in their writ & declaration, that the tenant hath no entry, but by such a stranger as the buyer shall list to name & appoint, where indeed the demaundants neuer had possess on thereof, nor yet the said stranger. And therupon the said tenant in taile shall appeare in the court, and by assent of the parties, shall vouch to warrant one & he knoweth well hath nothing to yeld in value. And the vouchee shall appere, & the demaundants shall declare against him, and therupon he shall take a day to compare at the same terme, and at that day by assent and couyn of the parties, hee
 f shall

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17.
 shal make default, vpon which default because
 it is a default in despite of the Court, the de-
 maundants shal haue iudgement to recouer as
 against the tenant in taile, and he ouer in value
 against the vouchee, and this iudgement & re-
 couerie in value, is taken for a bar of the taile
 for euer: how may it therfore be taken, that the
 law standeth with conscience, that as it seemeth
 allosoweth & fauoureth such sayned recoveries?
 St. If the tenant in taile sell the land for a cer-
 tain summe of money as is agreed betwixt the
 at such a price as is commonly vsed of other
 lands, and for the suertie of the sale suffereth
 such a recouerie as is aforesaid, what is the
 cause that moueth thee to doubt whether the
 said contract, or the recovery made therupō, for
 the suertie of the buyer that hath truly paid
 his money for the same, should stand with con-
 science? Do two things cause mee to doubt
 therein, one is for that, that after our Lord had
 giue the land of Behest to Abraham and to his
 seed, that is to say, to his childzen in posses-
 sion alway to continue, he said to Moyles, as it
 appeareth Leuit. 25. the land shall not bee sold
 for euer, for it is mine. And then our Lord as-
 signed a certain manner how the land might be
 redeemed in the yeare of Iublie if it were sold
 before: and forasmuch as our Lord would
 that the land so giuen to Abraham and his
 childzen should not be sold for euer, it seemeth
 that he doth against the ensample of God, that
 alieneth or selleth the land that is giuen to him
 and to his childzen, as lands intailed be giuen.
 Another cause is this: it appeareth by the
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commandement of God, that thou shalt not couet the house of thy neighbour &c. And if that concupiscence be prohibited, more ströger then the vnlawfull taking and withholding therof is prohibited: and forasmuch as tayed land, when the auncester is dead, is a thing that of right is belonging to his heire, for that he is heire according to the gift, how may the land with right or conscience be holden from him?

S Notwithstanding the prohibition of Almighty God, whereby the Land that was given to Abraham & to his seed might not be aliened for euer, yet lands within walled towngs might lawfully be aliened for euer, except the lands of the Leuites, as it appeareth in the said Chapter of Leuitic. 25. And so it appeareth that the said Prohibition was not generall for euery place, and that among the Iewes. And it appeareth also that it was given only to Abraham and his children, and so it was not generally to all people. And it appeareth also that it extended not but only to the land of promise, as it appeareth by the words of the said Chapter, where it is said thus, all the region of your possession shall bee sold vnder the condition of redeeming: whereby appeareth that lands in other Countries bee not bound to that condition, and as they bee not bound to that condition, by the same reason it followeth, that they bee not bound to the same succession. Therefore that said Law, that will that the Land given to Abraham & to his seed shall not be sold for euer, bindeth

The 26. Chapter.

bindeth no land out of the land of promise, & some men will say, that sithen the passion of our Lord was promulgate and knowne, bindeth not here. And to the second reason which is grounded upon the commandment of God: It must needs be granted that it is not lawfull to any man lawfully to conueit the house of his neighbor, and that then more stronger he may not build a fully take it from him: but then it remaineth for this yet to proue how in this case this tailed land that is sold by his assignee, and whe. of a recouerie is had recorded in the kings court, may be said the lands of the heire. D. That may be proued by the law of the realme, that is to say by the Statute of Vell-minster the second. Ca. 1. where it is said thus. The will of the giuer expressly contained in the deed of his gift, shal be from henceforth obserued, so that they to whom the tenements be so giuen, shal not haue power to alien, but that the lands after their death shall remaine to the issue or retourne to the donour, if the issue faile: By the which statute it appeareth evidently that though they to whom the tenements were so giuen, aliened them away, that yet neuer thelesse they in law and conscience by reason of the said Statute ought to remain to their heires according to the gift, for it is holden commonly by all Doctours that the commandements and rules of the law of man or of a positue law that is lawfully made, bind all that be subiects to the law according to the made of the maker, and that in the Court of conscience.

St. Dost thou think that if a man offend against a statute Penal that he offendeth in conscience? I admit that he do it not of a wilful disobedience, or that he will not obey the law, nor if he doe it of disobedience, I thinke he offendeth. D. If it be but only a Statute that is called Popular, it bindeth not in conscience to the payment of the penaltie, till it be reformed by the law, and then it doth bind in conscience: but if a statute be made principally to remedy the hurt of one partie, & for that hurt it giveth a penaltie to the partie, in that case the offender of the statute is bound immediately to refoze the damages to the value of the hurt, as it is vpon the statute of Waste, but if penaltie above the hurt he is not bound to pay till iudgement be given as it is said before: but statutes by which it is assign'd who shall have right or propriety to their lands and tenements, or to these goods or cattle, if it be not against the law of God, nor against the law of reason, binds all them that be subject to the law, in law and conscience, and such a statute is the statute of V Vest. 2. wherof we have treated before, wherefore it must be observed in conscience.

S. But some hold that the statute of V Vest. 1. the seconne was made of a singularity and presumption of many that were at the said Parliament, for exalting and magnifying of their owne blood, and therefore they say that that statute made by such a presumption bindeth not in conscience.

D. It is very perillous to iudge for certaine
 f. 19. that

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that the said Statute was made of such presumption as thou speakest of: for there bee many considerations to proue that the said Statute was not made of such presumption, but rather of a verie good mind of all the parliament, or at the least of the moze part thereof, and for the cōmon wealth of all the realme: and first in the King the whch in y^e said Parliament was the head, and most chiefe and principall part of the Parliament (as he is in euery Parliament) cannot be noted to be such intent: for it is not necessearie nor it was not then in vse, that lands of the Crowne should bee entailed: and in spiritual men, ne yet in certaine Burgesles & Citizens of the said Parliament which at that time had no land, there can be noted no such singularitie: nor yet in the Noble men and Gentlemen nor such other as were of the said Parliament and had lands and tenements. It is not good to iudge in certaine that they did it of such presumption, but it is good and expedient in this case as it is in ether cases that be in doubt, to hold the surer way, & that is, that it was made of charitie, to the intent that hee nor the heires of him to whom the land was given should not fall into extreme pouertie, and therby happely so run into offence against God: and though it were true as they say, that it was not made of charitie but of presumption and singularity: as they speake of: Neuerthelesse forasmuch as the statute is not against the Law of God nor against the Law of Reason, it must be obserued by all them that bee subiects vnto that Law.

Law. For as Iohn Gerson in the Treatise that he intituled in latine, De vita spiritali anima, the fourth lesson, and the third cogolary, saith, that God will that makers of Lawes iudge onely of outward things, and reserue secret things to him. And so it appeareth that man may not iudge of the inward intent of the deed, but of such things as bee apparant and certaine: but it is not apparant that there was any such corrupt intent in the makers of the said Statute: how may it therefore be said that that Law is good or rightwise, that not only suffereth such things against the statute, but also against the commaundement of God: So that some answered and say, that when the land is sold, and a recouerie is had thereupon in the Kings Court of Record, that it sufficeth to barre the taylor in conscience, for they say, that as the taylor was first ordained by the Law, so they say that by the Law it is adnulled againe. D. Be thou thy selfe Judge, if in that case there be like authoritie in the making of the taylor, as there is in the adnulling thereof: for it was ordained by authoritie of Parliament, the which is alway taken for the most high Court in this Realme before any other, and it is adnulled by a false supposell, for that, that they that bee named demaundants should haue right to the land, where in truth they had neuer right thereto: Whereupon followeth a false supposell in the writ, and a false supposell in the declaration, and a voucher to warrant by couin of such a person as hath nothing to yeld in value, and thereupon by couin

The 26. Chapter.

and collusion of the parties followeth the default of the voucher, by the which default the iudgement shalbe giue. And so al the iudgemēt is deriued & grounded of the vntreue supposel & coun of the parties, whereby the Law of the realme þ hath ordained such a writ of Etre to help the that haue right to lands or teneiments is defrauded, the court is decciued, the heire is disherited, & as it is to doubt, the buyer and the seller, their heirs & assignes hauing knowledg of the taile be bound to restitution, & verily I haue heard many times, that after the law of the Realme such recoveries should be no barre to the heire in the taile, if the law of the realme might be therein indifferently heard. S I cannot see but that after the Law of the realme it is a barre of the taile, for when the tenant in taile hath vouched to warrantie, & the voucher hath appeared & entred into the warranty, and after hath made default in despite of the court, soherupon iudgement is giuen for the demandant against the tenant, and for the tenant þ he shal recover in value against the voucher: if the heire in the taile should after bring his Formedon & recover the lands entailed, and after the voucher purchaseth landes, then should the heire also haue execution against him to the value of the lands entailed, as hence to his ancestor that was tenant in the first action, & so hee should haue his owne landes, & also the lands recovered in value: & therfore because of the presumption that the voucher may purchase lands after the iudgement, some be of opinion that it is in the law a good bar of the taile. D. I suppose that

that in that case thou hast put, that the vouchee
may barre the leuie in tale of his recouerie in
value, because he hath recovered the first lāds.
Nevertheless I will take a respite to be abused
of that recouerie in value. And if thou can yet
show me any other consideration why the said
recoueries should stand with conscience, I pray
thou let me heare thy conceit therein, for the
multitude of the said recoueries is so great,
that it were great pity that it should be bound
to restitution that by us lands by such recou-
eries, sith there is none (as far as I can heare)
dispose them to restore. Some men make
another reason to prove that the lord recou-
eries should be sufficient by the law to avoid the
statute of West then and if they be sufficient
thereto, they be sufficient in conscience. D. what
is their reason therein? In the 7. year of H. 8.
ca. 4. among other things it is enacted, that all
recouersers their heirs and all gnes, may ad-
uow and iustifie for rents, services, & customs
by them recovered, as they against a hom they
recovered might haue done. And then they say
that when the Parliament gave to such reco-
uersers authoritie to aduow and iustifie for
such rents, customs, and services, as they re-
covered, that the intent of the Parliament
was, that such recouersers should haue right to
that, for the which they should aduow or iusti-
fie: for els they say that it should be in vaine to
give them such power, & that the Parliament
should els be taken in maner as fortifiers of
wrongfull title, and so they say that such re-
couersers by reason of the said Statute haue
right

right by the law. D. That statute as it seemeth
 was made onely to giue to the recouersers, a
 forme to auow and iustifie which they had not
 before, though they had recovered vpon a good
 title. And the cause why they had no forme to
 auow or iustifie before the said Statute was,
 forasmuch as the recouersers did not by the
 pretence of their action, affirme the possession
 of him or them against whom they recovered,
 nor claimed not by them, but rather disaffir-
 med and destroyed their estate: And therefore
 they cannot alleage any continuance of their
 title by them, as they may that haue rents or
 seruices, or such other of the graunt of other
 by deed or by fine. And therefore as it seemeth
 the most principal intent of the Statute was,
 that such recouersers should auow and iustifie
 for rents, seruices & customes, as they should
 or might do that had them by fine, or deed: not
 hauing any respect as it seemeth whether they
 recovered against tenant in fee simple, or in fee
 taile, nor whether the recoveries were had
 vpon a rightfull title. And therefore as mee
 seemeth the said statute neither affirmeth nor
 disaffirmeth the title of recouersers, whereby
 they doe auow: For if a man had right before
 the recoverie, the right should remaine vnto
 him notwithstanding the said Statute, and so
 me seemeth that the title of them that haue the
 land entayled by such recoveries, is nothing
 fortified nor affirmed by the said statute, but
 that they are in the same case as they were be-
 fore, what thinkest thou therein? This matter
 is great, for as thou sayest there be so many
 that

that haue tailed lands by such recoveries, that
it were great pity and heauinesse to condemn
so many persons, & to iudge that they all were
bound to restitution. For I thinke there bee
but few in this realme that haue lands of any
notable value, but that they or their ancestors,
or some other by whom they claime, haue had
part therof by such recoveries. Insomuch that
Lords spiritual and Temporal, Knights,
Squires, rich men and poore, Monasteries,
Colledges and Hospitals haue such lands, for
such recoveries haue bene vlsed of long time:
who may thinke therefore without great hea-
uinesse, that so many men should be bound to
restitution, and that yet as thou saiest, no man
disposeth him to make restitution. And so I
am in manner perplexed and wot not what to
say in this case, but that yet I trust that igno-
rance may excuse many persons in this behalf.
D. Ignorance of the deed may excuse, but ig-
norance of the Law excuseth not, but it be in-
vincible, that is to say, that they haue donethat
in them is to know the truth: as to counsaile
with learned men and to aske them what the
Law is in that behalfe, and if they answer
them, that they may doe this or that lawfully,
then they be thereby excused in conscience. But
yet in mans law they bee not thereby dischar-
ged, but they that haue taken vpon them to
haue knowledge of the Law, bee not excused
by ignorance of the Law, ne no more are they
that haue a wilfull ignorance, and that would
rather be ignorant than to know the truth.
And therefore they will not dispose them to
aske

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aske any Counsaile in it, and if it be of a thing
 that is against the law of God, or the law of
 reason, no man shall be excused of ignorance,
 and so there be but few that be excused by ig-
 norance. What then, shall wee condemn so
 many and so notable men. Doct. We shall not
 condemn them, but wee shall shew them their
 perill. 1. Per I trust their daunger is not so
 great that they should be bound to restitution.
 For Iohn Gerson saith in the same booke called
 De vanitate Ecclesiastica, consider tu e te auda,
 Quod communis error facit ius; that is to say,
 A common error make h a righte, or which
 words as it seemeth some trust may be had. &
 though it were fully admitted he is d recover-
 ries were first had upon an unlawful ground,
 and against the good order of conscience, that
 yet neuerthelesse, forasmuch as they haue been
 vsed of long time, so that they haue bin take of
 diuers men that haue bin right well learned,
 in manner as for a law, that the buyers partly
 be excused, so that they be not bound to restitu-
 tion. And moreover, it is certaine that the
 Statute of Westminster the second, nor none
 other statute made by man cannot be of greater
 value or strength, than was the bond of matrimo-
 ny that was ordained of God. And though
 that bond of Matrimony was indissoluble,
 yet neuerthelesse Moles suffered a bill of refusal
 of the Iewes, which in Latin is called Libellū
 repudiū, and so they might thereby forsake
 their wiues, as it appeareth Deutro. 24. and
 therefore like as a dispensation was suffered
 against that bond, so it seemeth it may be a-
 gainst

against this statute. D. It is to that reason that thou hast last made of a bill of refusall, let all purchasers of land hear what our Lord saith in the Gospell of the Jewes, of that bill of refusall, Mathew 19. where he saith thus, For the hardness of your hearts Moises suffered you to leave your wives: for at the beginning it was not so. Of which words Doctours hold commonly that though such a bill of refusall was lawfull, so that they that refused their wives thereby, should be without paine in the law, yet it was neuer lawfull, so that it should bee without sin. And so likewise it may be said in this case that such recoveries bee suffered for the hardnesse of the hearts of Englishmen, which desire land & possession with so great greedinesse, that they can not be withdrawne fro it neither by the law of god nor of the realme: And therefore the rich men should not take the possessions of poore men from them by power, without colour of title, that is to say, neither by open Dissaisin, or by the oneie sale of the tenant in taile, and so to hold them against the expresse words of the statute, such recoveries haue bin suffered. And though for their great multitude they may happily be without paine as to the Law of the Realme: yet it is to fear that they be not without offence, as against God: and as to the other reason, that a common error should make a right, those words as me seemeth be to be thus vnderstood, that a custom vsed against the law of man shall be taken in some countries for law, if the people bee suffered so to continue. And yet some men call such

The 36. Chapter.

a custom an error, because that the continuance of that custom against the law was partly an error in the people, for that they would not obey the Law that was made by their superiours to the contrarie of that Custome : but it is to be understood that the said recoveries though they have bene long used, may not be taken to haue the strength of a custom, for many as well learned as vnclearned haue alway spoken against them and yet doe. And furthermore as I haue heard say a custom or a prescription in this Realme against the statutes of the realme preuaile not in h^e law. S. Though a custome in this Realme preuaileth not against a Statute as to the Law, yet it seemeth that it may preuaile against the statute in conscience: for though ignorance of a statute excuseth not in the law, neuertheless it may excuse in conscience, and so it seemeth that it may do of a custome. D. But if such recoveries cannot be brought into a lawfull custome in the law, it seemeth they may not be brought into a Custome in conscience, for conscience must alway be grounded vpon some Law, and in this case it cannot be grounded vpon the law of reason, nor vpon the Law of God: and therefore if the Law of man serue not, there is no ground whereupon conscience in this case may bee grounded, and at the beginning of such recoveries, they were taken to bee good because the Law should warrant them to be good, and not by reason of any Custome, and so if the reason of the Law will not serue in the recoveries, the custome cannot helpe, for an euill Custome

is to be put away. And therefore mee seemeth that the recoveries bee not without offence against God, though haply for their great multitude, and that there should not be as it were a subuersion of the inheritance of many in this Realme, as well of spiritual as temporal, they be without paine in the Law of the Realme, except such recoveries as by the common course of the Law be voidable in the Law by reason of some use, or of some other speciall matter: but what paine that is, I will not timorously iudge, but commit it to the goodnesse of our Lord, whose iudgements be verie deepe and profound, nor I will not fully asirme that they that haue lands by such recoveries ought to be compelled to restitution: but this seemeth to mee to bee good counsel, that euery man hereafter hold that is certaine, and leaue that is vncertaine, and that is, that hee keepe himselfe from such recoveries, and then hee shalbe free from all scrupulousnesse of conscience in that behalfe.

Sen. It seemeth that in this question thou ponderest greatly the said statute of Westminster the second, and that though it be but onely a Law made by man, that yet forasmuch as it is not against the law of reason, nor the Law of God, thou thinkest that it must be holden in conscience: and ouer that as it seemeth thou art somewhat in doubt, whether those recoveries bee any barre to the heire in the tayle by the law of the Realme, vntlesse that he haue in value in deed vpon the vouchee, and that thou wilt thereupon take a respite or thou shew thy
full

The 26. Chapter.

full mind therein, and in likewise thou thinkest as I take it, that those recoveries cannot be brought into a custom, but that the longer el, at they be suffered to continue if they be not good by the Law, the greater is the offence against God. And therefore thou ponderest little that custome, but yet thou agreest that it is good to spare the multitude of them that be possessed, a subversion of the inheritance of many of this realme might follow, and great strife and variance also, if they should be adulterated the time past, except there be any other speciall cause to avoid them by the Law, as thou hast touched in the last reason: but thou thinkest that it were good, that from hencefoz. h such recoveries should be clerely prohibited, and no be suffered to be had in vse, as they haue bene before, and thou counsellest all men therefore to refraine themselves from such recoveries hereafter. No. Thou takest well that I haue sayd, and accordyng as I haue meant it. S. Now I pray thee, sith I haue heard thy question of these recoveries, accordyng to thy desire, that thou wouldest answer me to some particular questions concerning Tailed lands, whereof thou hast at this tyme giuen vs occasion to speake D. Shew me these questions, & I will shew thee my mind therein with good will.

¶ The first question of the Student, concerning tailed lands.

Cap. 27.

If a disseisor make a gift in the taile to John a Shille, & J. at S. for the redēming of the title of the disseisor, agreeth with him that he shal haue a certain rent out of the same land to him & to his heires, & for the surety of the rent it is deuised that the disseisor shall release his right in the land &c. & that such a recovery as we haue spokē of before, shalbe had against the said J. at S. to the vse of the payment of the said rent and of the former taile: whether standeth that recoverie wel with conscience or not, as thou thinkest: D. I suppose it doth, for it is made for the strength and suertie of the taile, which the disseisor might haue clērely defeated & auoided if he would, & therfore I thinke if the said J. at S. had granted to the disseisor, only by his deed a certaine rent for releasing of his title, that graunt should haue bound the heires in the taile for euer. And then if the disseisor for his more suertie will haue such a recovery, as before appeareth, it seemeth that recoverie standeth with good conscience. S. It seemeth that thy opiniō is right good in this matter. And also it appeareth that with a reasonable cause, some particular recoveries may stād both with law & conscience to bar a taile.

¶ The second question of the student, concerning tailed lands.

Cap. 28.

If a tenant in taile suffer a recovery against him of his lands entailed, to the extent that

The 28. Chapter.

the recoverer shall stand seised thereof, to the
 vse of a certain woman whom he intendeth to
 take to his wife, for terme of life, and after to
 the vse of the first Taile, and after he marieth
 the same woman, whether standeth that reco-
 uerie with conscience, though other recoveries
 vpon bargains and sales did not: D. It see-
 meth yes, for though the Statute be that they
 to whom the tenements be so giuen, should not
 haue power to alien, but that the lands after
 their death should remaine to their issues, or
 reuert to the donours, if the issues failed: yet if
 hee to whom the lands were so giuen, take a
 wife, and dieth seised without heire of his bo-
 dy, and the donour enter, the woman shall re-
 couer against him the third part to hold in the
 name of her dowrie, for term of her life, though
 the taile be determined. And the same law is of
 tenant by the Curtesie, that is to say, of him
 that happeneth to marry one that is an inheri-
 trix of the land entailed, and they haue issue,
 the wife dieth, and the issue dieth, he shall hold
 the lands for terme of his life, as tenant by the
 curtesie, notwithstanding the words of the sta-
 tute, which say that after the death of the te-
 nant in taile without issue, the lands shall re-
 uert to the donor: and I think the cause is be-
 cause the intent of that statute shall not be ta-
 ken, that it intended to put away such titles as
 the Law should giue, by reason of the Taile:
 and so it seemeth that a like entent of the Sta-
 tut shall be taken for Jointures, for else the sta-
 tute might be sometime a letting of Warrimo-
 nie, and it is not like that the statute intended

so. And therefore it seemeth, that by the onely deed of the tenant in tayle, a Jointure may bee made by the intent of the Statute, though the words of the Statute serue not expressely for it: for many times the intent of the letter shall bee taken, and not the bare letter, as it appeareth in the same Statute, where it is said, that hee to whom the lands be giue shall haue no power to alien: yet the same Statute is construed that neither he nor his heirs of his bodie shall haue no power to alien: & so mee thinketh that such an intent shall be taken here for sauing of ioyntures. S. Truth it is, that sometime the intent of a Statute shall be taken farther than the expresse letter stretcheth, but yet there may no intent be taken against the the expresse words of the Statute, for that should bee rather an interpretation of the Statute, than an exposition: and it cannot bee reasonably taken, but that the intent of the makers of the said Statute was, that the land should remaine continually in the heires of the taile, as long as the taile endureth: and there can no Jointure be made neither by deed nor by reuerie, but that the taile must thereby bee discontinued, and therefore this case of ioynture is not like to the sayd cases of Tenant in Dower, or Tenant by the Curtesie: for the title of Dower, and of Tenancie by the Curtesie groweth most specially by the continuance of the possession in the heires of the Taile, but it is not so of ioyntures: and therefore by the onely deed of the tenant in the Taile, there may no Jointure bee lawfully made against the expresse words

The 29. Chapter.

of the statute. And if there be any made by way of recoverie, then it seemeth that it must be put vnder the same rule, as other recoveries must be of lands entailed.

¶ The third question of the Student concerning tyled lands.

Cap. 29.

If John at Stoke being seised of lands in fee, of his own motiō make a feoffment of certayne lands to thintent that the feoffers shal thereof make a gift to the said Jo. at Stoke to haue to him and to his heires of his body, and they make the gift according. And after the said Jo. at Stoke falleth into debt, wherefore he is taken and put in prison, and thereupon for payment of his debts, he selleth the same land, and for suertie of the buyer he suffereth a recovery to be had against him in such manner as before appeareth, whether standeth that recovery to conscience or not? Do. I would here make a litle digressiō to aske thee another question or that I make answer to thine: that is to say, to seele thy mind how the Law by the which the body of the debtor shal be taken and cast into prisō, there to remain til he haue paid the debt, may stand with conscience, specially if he haue nothing to pay it with, for as it seemeth if he will relinquish his goods which in some laws is called in latin Cedere bonis, that he shall not bee imprisoned, and that is to be vnderstood most specially if hee bee fallen into
po-

ponertie, and not through his owne default: X
 S. There is no law in this realme that the de-
 fendan may in any case Cedere bonis, & as me
 seemeth if there were such a law, it should not
 be indifferent, for as to the knowledge of him
 that the money is owing to, the debtoz might
 Cedere bonis, & is to say, relinquish his goods,
 and yet retaine to himselfe secretly great ri-
 ches. And therefore that law in such case se-
 meth more indifferent & righteous that com-
 mitteth such a debtoz to the conscience of the
 plaintife to whom the money is owing, than
 the committing him to the conscience of him
 that is the debtoz: for in the debtoz some de-
 fault may be assigned, but in him to whom the
 mony is owing, may be assigned no default. D.
 But if he to whom the debt is owing, know-
 eth that the debtoz hath nothing to pay the
 debt with, and that hee is fallen into pouertie
 by some casualtie, and not through his owne
 default, doth the law of England hold, that he
 may with good conscience keepe the debtoz still
 in prison till he be paid: S. May verily, but it
 thinketh more reasonable to appoint the liber-
 tie and the iudgement of conscience in that case
 to the debtoe than to the debtoz, for the cause
 before rehearsed. And then the debtour, if hee
 knew the truth, is (as thou hast said) bound in
 conscience to let him goe at libertie though hee
 be not compellable thereto by the Law. X
 And therefore admitting it for this tyme, that the
 law of Englad in this point is good and iust,
 I pray thee that thou wilt make answer to
 my question. D. I will with god will, and
 there-

The 29. Chapter.

therfoze as me ſeemeth, forasmuch as it appeareth that the said gift was made of the meere libertie and freewill of the said John at Moke, and without any recompence: that therfore it cannot be otherwise taken, but that the intent of the said J. at Moke, aswell at the time of the said feoffement, as at the time that hee receiued againe the said gift in the taile, was, that if he happened afterwards to fall into pouertie, that he might alien the said land to relieue him with, for how may it be thought that a man will so much ponder the wealth of his heire, that he will forget himselfe: and so it seemeth that not onely the said recouerie standeth with conscience, but also if he had made onely a feoffement of the land, the feoffement should be in conscience a good barre of the taile: but if the said feoffement and gift had bin made in consideration of any recompence of money, or for any matrimony or such other, then the feoffement of the said J. at M. should not bind his heire, & if he then suffered any recouerie thereof, then his recouerie should be of like effect as other recoveries whereof wee haue treated before, & that which I said it was good to fauour rather for their multitude, than for the conscience: and the same law is, that if the son and the heire of the said J. at Moke in case that the said gift was made without recompence, alien the land for pouertie after the death of his father, the recovery bindeth not but as other recoveries doe: for it cannot bee thought that the intent of the father was, that any of his heirs in tail should for any necessitie disherite all other heirs in taile

taile that should come after him, but for himself me thinketh it is reasonable to Judge in such maner as I haue said before. S. And though the intent of the said John at Moke, when he made the said feoffment, and when he toke a gain the said gift in taile, were that if he fel in need that he might alien: yet I suppose that he may not alien though percase for the more suertie he declared his intent to be such vpon the livery of seisin: for that intent was contrary to the gift that he freely toke vpon him, and when any intent or condition is declared or reserved against the state that any man maketh or excepteth: then such an intent or condition is void by the law, as by a case that hereafter follosweth will appeare, that is to say. If a man make a feoffment in fee, vpon condition that the feoffee shall not alien to any man, that condition is void, for it is incident to euery state of the fee simple, that he is so seised may alien. And like as in a fee simple there is incident a power to alien, so in a state taile there is a secret intent vnderstood in the gift, that no alienation shall be made. And therefore though the intent of the said Jo. at M. were, that if he fell into pouertie that he might sell, and though he at the taking of the gift openly declared his intent to be so: yet the intēt should be void by the law as me seemeth, and if it be void by the law, it is also void in conscience, and so the said recovery must be take in this case to be of the same effect, as recoveries of other lands intailed be, and in no other maner.

The 30. Chapter.

¶ The fourth question of the Student, concerning Recoveries of Enheritances intailed.

Cap. 30.

If an Annuitie be granted to a man to haue
e to perceiue to the grantor, & to the heirs of
his body, of the cosers of his grantor: and
after the grantor suffereth a recovery against
him in a writ of Enere, by the name of a rent in
Dale of like sum as the Annuitie is of, with
vouchers & iudgement after the cōmon course,
and both parties intend that the Annuity shall
be recovered: whether shall the recovery bind
the heire in tale of his Annuitie? D. What if it
were a rent going out of land, of what effect
should the recovery be then? Stu. It should be
then of like effect as if it were of land. D. And
so it seemeth to be of this Annuitie, for as mee
thinketh, a rent, and Annuitie bee of one effect,
for the one of them shall be paid in ready money
as the other shall. St. Truth, and yet there be
many great diuersities betwixt them in the
law. D. I pray thee shew me some of those di-
uersities. S. Part I shall shew thee, but I
wot not whether I can shew thee all, but
first thou shalt vnderstand that one diuersity is
this. Every Rent, be it Rent seruice, Rent
charge, or Rent secke, is going out of land, but
an Annuitie goeth not out of any land, but
chargeth only the person, that is to say, the
graunto, or his heires that haue Alets by
discent, or the house if it bee graunted by a
house

house of Religion to perceine of their cofrers. Also of an Annuittie there lyeth no action, but onely a writ of Annuittie against the grauntour, his heires, or successours, and that writ of Annuittie lyeth neuer against the pernour, but only against the grantor or his heires: but of a rent, the same action may lye, as both of land as the case requireth, and it lyeth sometime of rent against the pernour of the rent, that is to say against him that taketh the rent wrongfully, & sometime against neither. As of a rent seruice, the same may lye for the Lord against the Mesne & the Disseisor, or sometime against the Mesne only, if he did also the disseisin. Also an Annuittie is neuer taken for an assets, because it is no freehold in the Law, ne it shall not be put in execution vpon a statut Marchant, Statut Staple, ne Elegit, as a rent may. And because the said writ of Entre lay not in this case of this annuittie, & that it cannot be intended in the law to be the same Annuittie, though it be of like sum with the annuittie, ne though the parties assented and met to haue the same annuittie recovered by the said writ of Entre, therefore the said recoverie is void in law and conscience. But if such a recoverie be had of rent with a voucher puer, then it shall be taken to be of like effect, as recoveries of lands be in such maner as we haue treated of before.

¶ The fift question of the Student concerning tyled lands.

The 31. Chapter.

Cap. 31.

If lands be given to a man and to his wife in the name of her Jointure, by the father of the husband, to have and to hold to them & to the heirs of their two bodies begotten, & after they have issue & the husband dieth, and the wife alieneth the land, & against the statut of 11. H. 7. suffreth a recovery thereof to be had against her, to the use of the buyer, & after her son & heir apparant that is heir to the taile releaseth to the recoverers by fine, & dyeth, having a brother alive, and after the mother dyeth: who hath right to the land, the buyer, or his brother of him that released? D. what is thine opinion therein, I pray thee shew mee. S. It seemeth that the buyer hath right, for by the said statut made in the 11. yere of H. 7. among other things it is enacted, that if any woman which hath lands of the gift of her husband, or of the gift of any of the Ancestors of the husband suffer any recovery thereof against her, by co-venant, that then such recovery shalbe void, & that it shall be lawfull to him that should have the land after the death of the woman to enter, & it to hold as in his first right: provided alway that that statute shal not extend where he that should have the land after the death of the woman is agreeable to any such alienation or recovery, so that the agrement be of record. And forasmuch as the heir in this case agreed to the said recoverie & fine, which is one of the highest Records in the law, it seemeth that the buyer hath right against that heir that agreed, and against

against all that shall be heire of the tayle, and that not onely by the said recovery, but also by the said Statute, whereby the said recoverie with assent of the heir is affirmed. D. Though the buyer in this case haue right during the life of the heire that released, yet neuertheless, after his death his heir as it seemeth may lawfully enter: for the agreement wherof the statute speaketh, must as I suppose either be had before the recoverie, or els at the time of the recoverie: For if a title by reason of the sayd Statute be once deuolute to the heir in the taile, then the right as me seemeth cannot be extinct nor put away by the onely fine of the heire, no more than if he had died, and the next heire to him had released to the buyer by fine, in which case the release could not extinct the right of the title, nor the right of Entree that is giuen by the Statute: and so as me seemeth, his next heire may therefore enter. S. As I perceiue all thy doubt is in this case, because the assent of the heire was after the recoverie: for if it had bin at the time of the recoverie, as if the heire had bin vouched to warrant in the same recoverie, and hee had entred, and thereupon the iudgement had been giuen, thou agreest well, that the recovery should haue auoided the taile for ever.

Doctor. That is true, for it is in expresse words of the Statute, but when the assent is after the recoverie, then mee thinketh it is not so, ne that the right of the first taile, which was receiued by the sayd Statute, shall not bee extinct by his fine, no more than it shall in
other

The 31. Chapter.

other taile. S. I will be aduised vpon the opinion in this matter, but yet one thing would I moue further vpon this statute, and that is this: Some say, that by this statute all other recoveries that haue bin had ouer beside these recoveries of Jointures be affirmed: for they say, that sith the Parliament at the making of this statute, knew well that many other recoveries were then vsed and had, to defeat Tayles, that it was like that they would so continue, which neuerthelesse the Parliament did not prohibit for the time to come, as it did the said Recoveries of Jointures: that it is therefore to suppose, that they thought that they should stand with Law and conscience: but because Jointures were made rather for the sauing of the inheritance of the husband than to destroy the inheritance, they say that the Parliament thought and abindged the alienations and recoveries of such Jointures to be against the law & conscience, and not the Alienations of other lands intailed: for if they had, they say that the Parliament would haue auoided recoveries of tayled lands generally, as well as it did of Recoveries of Jointures. Do. As to that opinion I will answere thee thus for this time, that though that the makers of the sayd estatute onely put away recoveries of Jointures, and not other recoveries, that yet it cannot be taken therefore that their intent was that the other Recoveries should stand good and perfect: for they spake the only of Jointures, because there was no complaint made in the Parliament at that time, but
against

against recoveries had of Jointures, and therefore it seemeth that they intended nothing concerning other recoveries, but that they should be of the same effect as they were before, and no otherwise. And that will appeare more plainly thus: though the makers of the sayd Statute intended to put away & adnuil such recoveries as should be made of iointures after a certaine day limited in the Statute, that yet they intended not to auoid ne affirme such recoveries of Jointures as were passed before that time: and if they intended not to auoid ne affirme the recoveries had of iointures before that time, then how can it be taken, that they intended to put away, or affirme other recoveries that were passed before that time, & not of Jointures, that would not affirme, ne put away recoveries passed of iointures before that time? And so as it seemeth, they intended to spare the multitude of them that were passed of both, and not to comfort any to take them after that time. S. I am content thy opinion stand for this time, and I will aske thee another question.

¶ The sixt question of the Student concerning tailed lands.

Cap. 32.

If tenant in taile be disseised, & die, & an ancestor collateral to the heire in taile release to a warranty, and dye, & the warrantie discerneth vpon the heire in the taile: whether is hee there.

The 32. Chapter.

therby barred in cōscience, as he is in the law? D. Because your principall intent at this time is to speak of recoueries, & not of warranties, & also because it hath bin of long time taken for a principall Maxime of the law, & it should bee a barre to the heires aswell that claime by a fee simple, as by state taile, and for that also that it was not put away by the said statute of W. 2. which ordained the taile, I will not at this time make thee an aunswere therein, but will take a respite to be aduised. Sr. Then I pray thee yet or we depart, shew me what was the most principall cause that moued thee to moue this questiō of reconeries had of tailed lands. D. This moued me thereto. I haue perceiued many times that there bee many diuers opinions of these Recoueries, whether they stand with cōscience or not, & that it is to doubt that many persons run into offence of Cōscience thereby. And therefore I thought to feele thy mind in them, whether I could perceiue that it were cleere, that they serued to breake the taile in law and cōscience, or that it were cleerly against cōscience so to breake the taile, or that it were a matter in doubt: & if it appeared a matter in doubt, or that it appeared that the matter were bled cleerly against cōscience, then I thought to doe somewhat to make the matter appeare as it is, to the intent that they that haue the rule & charge ouer the people aswell the spirituall men as tempozal men, should the rather endeuour them to see it refozmed for the commonwealth of the people, aswell in bodie as in soule. For when any thing is bled to the dis-

displeasure of God, it hurteth not onely the bo-
dy, but also the soule. And tēporal rulers haue
not onely cure of the bodies, but also of the
soules, & shall answere for them if thy perish in
their default. And because it seemeth by h̄ more
apparrant reason that the tailes be not broken,
ne fully auoided by the said recoveries, & that
yet neuerthelesse the great multitude of them
that be passed is right much to bee pondered :
Therefore it were very good to prohibite them
for time to come, to put away such ambigu-
ties and doubts as rise now by occasion of the
said recoveries, and so they be put as snares to
deceiue the people, and so will they be as long
as they be suffered to cōtinue. And me thinketh
verily that it were therefore right expedient,
that tailed lands should from henceforth ei-
ther be made so strong in the law, that the taile
should not be broken by recoverie, sine swith
proclamation, collateral warrant, nor other-
wise : or else that all tailes should be made fee
simple, so that every man that list to sell his
land, may sell it by his bare feoffment, & with-
out any scruple or grudge of conscience: & then
there should not be so great expēces in the law,
nor so great variance among the people, ne yet
so great offence of conscience as there is now
in many persons. S. Merily mee thinketh that
thy opinion is right good, & charitable in this
behalfe: and that the rulers be bound in con-
science to looke vpon it, to see it reformed and
brought into good order. And verily by that
thou hast said therein, thou hast brought me into
remembrance, that there be diuers like snares

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concerning spirituall matters suffered among
 & people, wherby I doubt that many spiritual
 rulers be in great offence against god. As it is
 of the point that spirituall men haue spoken so
 much of, that priests should not be put to an-
 swere before lay men, specially of felonies and
 murders: & of the statute of 45. E. ca. 3. where
 it is said, that a Prohibition shall lye where a
 man is sued in the spirituall Court for tithe of
 wood, & is aboue & age of xx. yerres, by & name of
 Silua Cedua as it hath done before: & they haue
 in open Sermons, & in diuers other open co-
 munications & counsels caused it to be openly
 notified & known, that they should be al accur-
 sed that put priests to answer, or that main-
 tain & said estatute, or any other like to it. And
 after when they haue right wel perceiued, that
 notwithstanding al that they haue don therein,
 it hath bin vbled in the same points through all
 the realme, in like maner as it was before: the
 they haue set stil & let & matter passe, & so when
 they haue brought many persons in great dan-
 ger, but most specially them that haue giuen
 credence to their saying, & yet by reason of & old
 custom haue done as they did before, the there
 they left them: but verily it is to feare that
 there is to themselves right great offence ther-
 by, that is to say, to see so many in so great dan-
 ger as they say they be, and to do no more to
 bring them out of it, than they haue done for
 it: if it be true as they say, they ought to sticke
 to it with effect in all charitie, til it were refoz-
 med: and if it be not as they say, then they haue
 caused many to offend that haue giuen credence

do them, and yet contrarie to their owne conscience do as they did before, & that percase shold not haue offended if such sayings had not been. And so it seemeth that they haue in these matters done either too much, or too little.

And I beseech almighty God, that some good man may so call vpon all these matters, that we haue now communed of, so that they that be in authoritie may somewhat ponder them, and to order them in such maner that offence of conscience grow not so lightly thereby hereafter, as it hath done in times past. And verily he that on the Crosse knew the price of mans soule, will hereafter aske a right strait account of rulers for euery soule that is vnder them, and that shall perish through their default.

Thus haue I shewed vnto thee in this little Dialogue, how the Law of England is grounded vpon the Law of reason, the law of God, the generall Customes of the Realme, & vpon certaine principles that be called Maximes, vpon the particuler Customes vsed in diuers Cities and countries, and vpon statutes which haue been made in diuers Parliaments by our Soueraigne Lord the King and his progenitors, and by the Lords Spiritual and Temporall, and all the Commons of the Realme. And I haue also shewed thee in the 9. Chapter of this Booke, vnder what maner the said generall Customes and Maximes of the law may be proued & affirmed if they were denied, & diuers other things bee contained in this present Dialogue, which will appeare in

The 32. Chapter.

My table that is in the latter end of the booke,
as to the Readers wil appeare. And in the end
of the said dialogue, I haue at thy desire shew-
ed thee my conceit concerning Recoueries of
tailed lands, and thou hast vpon the said reco-
ueries shewed me thine opinion. And I be-
seech our Lord set them shortly in a good cleere
way: for surely it wil be right expedient for the
well ordering of conscience in many per-
sons, that they be so. And thus the
God of peace and loue
be alway with vs.

Amen.





Here endeth the first Dialogue in English, with new additions, betwixt a Doctor of Diuinitie, and a Student in the Lawes of England. And hereafter followeth the second.

In the beginning of which Dialogue the Doctor answereth to certaine questions, which the Student made to the Doctor before the making of his Dialogue, concerning the lawes of England & conscience, as appeareth in a Dialogue made betweene them in Latine the 24. ch. And he answereth also to diuers other questions, that the Student maketh to him in this dialogue, of the law of England and conscience. And in diuers other Chapters of this present Dialogue is touched shortly, how the lawes of England are to bee obserued and kept in this Realme, as to temporall things, as well in law as in conscience, before any other lawes. And in some of the Chapters thereof, is also touched that spirituall Iudges in diuers cases be bound to giue their Iudgements according to the kings law. And in the latter end of the booke the Doctor moueth diuers cases concerning the lawes of England, wherein he doubteth how they may

stand with conscience, wherunto the Student

maketh answer in such maner

as to the Reader will

appeare.

The Introduction.

In the latter end of our first Dialogue in latine, I put diuers cases groundes vpon the lawes of England, wherein I doubted, and yet doe, what is to bee holden therein in conscience. But forasmuch as the time was then farre past, I shewed thee that I would not desire thee to make aunswere to them forthwith at that time, but at some better leisure, wherunto thou saist thou wouldest not onely shew thine opinion in these cases, but also in such other cases as I would put: wherefore I pray thee now (forasmuch as me thinketh thou hast good leisure) that thou wilt shew me thine opinion therein. Do, I will with good will accomplish thy desire: but I would that when I am in doubt what I laie of this realm is in such cases as thou shalt put, that thou wilt shew me what I laie is therein: for though I haue by occasion of our first Dialogue in latine learned many things of the lawes of this realm which I knew not before, yet neuertheless there be many mothings that I am yet ignorant in, and that peradventure in these self cases that thou hast put & intende hereafter to put: & as I said in the first Dialogue in latine the 20. Cha. to search conscience vpon any case of the law it is in vaine, but where the law in the same case is perfectly knowne. So I will with good will do as thou saist, & I intend to put diuers of the same questions, that be in the last Cha. of the said Dialogue in latine, & sometime I intend to al' er some of them, and adde some new questions to them, as I shalbe most

in doubt of. D. I pray thee do as thou saist, and I shal with good will either make answer to them forthwith aswell as I can, or shall take longer respice to bee aduised, or else parauenture agree to thine opunion therein, as I shall see cause. But first I would gladly know the cause why thou hast begun this Dialogue in the English tongue, & not in the latine tongue, as the first cases þ thou desirest to knowe mine opunion in, be, or in French as the substance of the law is. S. The cause is this. It is right necessarie to all men in this realme, both spirituall & temporal for the good ordering of their conscience, to know many things of the Law of England þ they bee ignorant in. And though it had bin moze pleasant to thē that be learned in the latin tongue, to haue had it in latine rather than in English: yet neuerthelesse forasmuch as many can read English þ vnderstand no latin, & some þ cannot read English, by hearing it read may learne diuers things by it, that they should not haue learned if it were in latin: Therfoze for the profit of the multitude it is put into the English tongue rather than into the latin or french tongue. For if it had bin in French, few should haue vnderstood it, but they that be learned in the law, and they haue least need of it, forasmuch as they knowe the law in the same cases without it, & can better declare what conscience will thereupon, than they that know not the law nothing at al. To them therfoze that bee not learned in the law of the realme this treatise is specially made: for thou knowest well by such studies thou hast

The 1. Chapter.

taken to some knowledge of the Law of the realme, that is to them most expedient. D. It is true that thou saiest and therefore I pray thee now proceed to thy questions.

¶ The first question of the Student.

Cap. 1.

If tenant in taile after possibility of issue extinct, do wast, whether doth he therby offend in conscience though he be not punishable of wast by the law. D. As the law cleare that he is not punishable for the waste. Sr. Pe verely. D. And what is the law of tenants for terme of life, or for terme of yeeres if they doe wast. S. They bee punishable of waste by the Statute, and shall pay treble damages: but at the common law before the statute they were not punishable. D. But whether thinkest thou that before the Statute they might haue done wast with conscience, because they were not punishable by the Law. Sr. I thinke not, for as I take it, the doing of wast of such particuler tenant for terme of life, for terme of yeeres, or of tenants in Dowry, or by the curtesie, is prohibited by the law of reason, for it seemeth of reason that when such leases be made, or that such titles in Dowry, or by the curtesie be given by the Law, that there is onely given vnto them the annuall profits of the land, and not the houses and trees, and the grauell to digge and carrie away, whereby the whole profit of them in the reuersion should be taken away
for

for ever. And therefore at the common law for
wast done by tenant in dower, or tenant by the
curtesie, there was punishment ordained by the
Law, by a prohibition of wast, whereby they
should haue payed damages to the value of
the wast. But against tenant for terme of life
or for terme of yeeres, lay no such prohibition,
for there was no Maxime in the law therein,
against them, as there was against the other.
And I thinke the cause was, forasmuch as it
was iudged a folly in the lest that made such
a lease for terme of life, or for terme of yeeres,
that at the time of the lease he did not prohibit
them they should not do wast, and such hee did
not prouide no remedie for himselfe, the Law
would none prouide. But yet I thinke not that
the intent of the law was, that they might law-
fully and with good conscience doe wast, but a-
gainst tenants in dower, and by the curtesie
the law prouided remedie, for they had their ri-
tle by the law.

And verily me thinketh that this tenant in
taile as to doing of wast, should be like to a ten-
ant for terme of life: for he shall haue the land
no longer than for term of his life, no more than
a tenant for terme of life shall, and the wast of
this tenant is as great hurt to him in the re-
uerſion or the remainder, as is the wast of a
tenant for terme of life, and if hee alien, the
donor shall enter for the forfeiture, as hee shall
vpon alienation of a tenant for terme of life,
and if hee make default in a præcipe quod red-
dar, the donor shall bee receiued as hee shall bee
vpon the default of a tenant for terme of life:

By my.

and

The 1. Chapter.

and therefore mee thinketh he shall also be punishable of wast, as tenant for terme of life shal. S. If he alien, the donoꝝ shal enter as thou saist because the alienation is to his disheritance, & therfoze it is a forfeiture of his estate: and that is by an auncient Maxime of the law that giueth that forfeiture in the selfe case, and if hee make default in a Precipe quod reddat, he in reuerſio, as thou saist, shalbe receiued, but that is by the statute of West. 2. for at the common law there was no such reſcūt: & as for the statute that giueth the action of wast against a tenant for terme of life, and for terme of yeeres, it is a statute penal, and shal not be taken by equity: and so there is no remedy giuen against him, neither by common law nor by statute, as there is against tenant for terme of life, & therfoze he is unpunishable of wast by the law D. And though he be unpunishable of wast by the law, yet neuerthelesse mee thinketh he may not by conscience do that, that shall be hurtfull to the inheritance after his time, with he hath the land but for terme of his life, no more than a tenant for terme of life may, for then he should do as he would not be done vnto. For thou agreeſt thy selfe, that though a tenant for terme of life was not punishable of wast before the Statute, that yet the Law iudged not that he might rightfully and with good conscience doe wast. And therfoze at this day if a scotement bee made to the vse of a man for terme of life, though there be no actio against him for wast, yet he offendeth in conscience if he do wast, as tenant for terme of life did afore the Statute

tute, when no remedie lay against him by the law. S. That is true, but there is great diuersitie between this tenant and a tenant for terme of life: for this tenant hath good authoritie by the donour to doe wast, and so hath not the tenant for terme of life, as it is said before: for the estate of a tenant in taile after possibilitie of issue extinct, is in this manner, when lands be giuen to a man and to his wife, & to the heires of their two bodies begotten, and after the one of them dyeth without iepres of their bodies begotten, then he or she that overliueth, is called tenant in taile after possibilitie of issue extinct, because there can neuer by no possibilitie be any heire that may inherite by force of the gift. And thus it appeareth that the donors at the time of the gift, receiued of the donor estate of inheritance, which by possibility might haue continued for euer, whereby they had power to cut downe trees, and to doe all thing that is wast, as tenant in fee simple might. And that authoritie was as strong in the law, as if the lessour that maketh a lease for terme of life, say by expresse words in the lease, that the lessee shall not be punishable of wast. And therefore if the donour in this case had graunted to the donee that they should not be punishable of wast, that graunt had been void, because it was included in the gift before, as it should be vpon a gift in fee simple: and so forasmuch as by the first gift, and by the livery of seisin made vpon the same, the donees had authoritie by the donour to do wast: Therefore though that one of those donees be now dead without issue, so that

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that it is certaine, that after the death of the o-
ther, the land shall reuert to the donoz: yet the
authozitie that they had by the donour to doe
wast, continueth as long as the gift, and the
liuerie of seisin made vpon the same cōtinueth.
And I take this to be the reason why he shall
not haue in aid as tenant for terme of life shall,
that is to say, for that he cannot aske helpe of
that Maxim, whereby it is ordained, that a
tenant for terme of life shall haue in aid: for hee
cannot say, but that he took a greater estate by
liuery of seisin that was made to him, which
yet continueth, than for terme of life: and so I
thinke him not bound to make any restitution
to him in the reuersion in this case, for the
wast. D. Is thy mind only to proue that this
tenant is not bound to make restitution to him
in the reuersion for the wast: or that thou thin-
kest that he may with clere conscience doe all
maner of wast? S. I intend to proue no more
but that he is not bound to restitution to him
in the reuersion. D. Then I will right well a-
gree to thine opinion for the reason that thou
hast made: but if thy mind had bin to haue pro-
ued that he might with clere conscience haue
done al maner of wast, I would haue thought
the contrary thereto, & that the tenant in fee sim-
ple may not do al maner of wast and destructi-
on with conscience, as to pull downe houses &
make pastures of ciues and towncs, or to do
such other acts which be against the common
wealth. And therfore some wil say, that tenant
in fee simple may not with conscience destroy
his woods & coale pits wherby a whole coun-
trei

they for their money haue had fuel, & yet though he do so, he is not bound by conscience to make restitution to no person in certain. But now I pray thee ere thou proceed to the second case, that thou wilt somewhat shew me what thou meanest when thou saiest, at the common law it was thus or thus? I vnderstand not fully what thou meanest by that terme, at the common Law. S. I shall with godd will shew thee what I meane thereby.

¶ What is meant by this terme when it is said, thus it was at the Common Law.

Cap. 2.

The common law is taken three maner of waies. First it is taken as a law of this realm of England disseuered fro al other Lawes. And vnder this maner taken: It is oftentimes argued in the Lawes of Englad, what matters ought of right to be determind by the common Law, and what by the Admirals Court, or by the Spirituall court: And also if an Obligation beare date out of the realme, as in Spaine, Fraunce, or such other, It is said in the Law & truch it is, that they be not pleadable at the comon law. Secondly the common law is taken as the kings court: of his Bench, or of the Common Place, and it is so taken when a plee is remoued out of ancient demesne for that the land is franke soc & pleadable at the commō Law, that is to say, in the kings court, and not in Ancient demesne.

And

The 3. Chapter.

And vnder this maner taken, it is oftentimes
pleaded also in bafe Courts, as in courts Ba-
rons, the county, and the court of Pipouders,
and fuch other, this matter or that &c. ought
not to be determined in that Court, but at the
Common Law, that is to fay, in the Kings
Courts &c. Thirdly by the Common law is
vnderftood fuch things as were law before a-
ny ftatute made in þ point that is in queftion,
fo that that point was holden for Law by the
general or particuler customes and Maxims
of the Realme, or by the law of reason and the
law of god, no other law added to them by ftat-
ute, nor otherwise, as is the cafe before rehear-
fed in the firft chapter, where it is faid: that at
the Common Law tenant by the Curtesie &
tenāt in Dower were punifhable of waft, that
is to fay, that before any ftatute of waft made,
they were punifhable of waft by the grounds
& Maxims of the Law, vfed before the ftatute
made in that point. But tenaunt for terme of
life, ne for terme of yeers, were not punifhable
by the faid grounds and Maxims, till by the
ftatute reinedy was giuen againft them, and
therefore it is faid, that at the Common Law
they were not punifhable of waft. Do. I pray
the now proceed vnto the fecond queftion.

¶ The fecond queftion of the Student.

Cap. 3.

If a mā be outlawed & neuer had knowledge
of the fuit, whether may the king take at his
goods,

goods, & retaine them in conscience as he may
 by the law. Q. What is the reason why they be
 forfeited by the law in that case? An. The ve-
 ry reason, for that it is an old Custome and an
 old Maxime in the law, that he that is Out-
 lawed shall forfeit his goods to the King, and
 the cause why that Maxime began, was this:
 When a man had done a trespassse to another, or
 another offence wherefore procelle of belagary
 lay, and he that the offence was done to, had
 taken an action against him according to the
 law, if hee had absented himselfe and had no
 lands, there had bene no remedy against him:
 for after the law of England, no man shall be
 condemned without answer, or that hee ap-
 peare and will not answer, except it bee by
 reason of any Statute. Therefore for the pu-
 nishment of such offendours as will not appear
 to make answer and to bee iustified in the
 Kings Court, it hath bene vsed without time
 of mind, that an attachement in that case should
 be directed against him retournable in the
 Kings Bench or the Common place: and if
 it were returned thereupon that he had nought
 wherby hee might bee attached, that then
 should goe forth a Capias to take his person,
 and after an Alias Capias, & then a Pluries: and
 if it were returned vpon euery of the said Ca-
 pius that hee could not bee found and hee ap-
 peared not, then should an Exigent be directed
 against him, which should haue so long a day
 of returne, that five Counties might bee hold-
 den befoze the returne thereof, and in euerie
 of the said five Counties, the defendant to bee
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The 3. Chapter.

solemnly called, and if he appeareth not, then for his contumacie and disobedience of the law, the Coroners to giue Iudgement that he shall bee Outlawed, whereby hee shall forfeit his goods to the king, and leese diuers other advantages in the Law that needeth not here to be remembred now. And so because hee was in this case called according to the law and appeared not, it seemeth that the King hath good title to the goods both in law and conscience.

D. If he had knowledge of the suit in very deed, it seemeth the king hath good title in conscience as thou saiest. But if he had no knowledge thereof, it seemeth not so, for the default that is adiudged in him (as appeareth by thine owne reason) is his contumacie and disobedience of the law, and if he were ignorant of the suit, then can there bee assigned to him no disobedience: for a disobedience implieth a knowledge of that he should haue obeyed vnto.

Ser. It seemeth in this case that hee should be compelled to take knowledge of the suit at his perill: for sith he hath attempted to offend the Law, it seemeth reason that he shalbe compelled to take heed what the law will doe against him for it, and not only that, but that he should rather offer amends for his Trespasse than to tarrie till he were sued for it.

And so it seemeth the ignorance of the suite is of his owne default, specially sith in the law is set such order that euery man may know if he will, what suit is taken against him, and may see the Records thereof when hee will: and so it seemeth that neither the partie nor the

the law be not bounden to giue him no know-
ledge therein. And ouer this I would some-
what moue further in this matter thus. That
though that action were vntrue, and the defend-
ant not guiltie, that yet the goods be forfeited
to the king, for his not apparance, in law, and
also in conscience and that for this cause: the
king as Soueraigne and head of the law, is
bounden of Justice, to graunt such writs, and
such processses as be appointed in the law, to e-
uery person that wil complaine, be his summe
true or false, and thereupon the king (of Jus-
tice) oweth as wel to make Processse, to bring
the defendant to answer, when he is not guilt-
ie, as when he is guiltie: and then when there
is a *Warranc* in the Law, that if a man be out-
lawed in such maner as befoze appeareth, that
hee shall forfeit all his goods to the king, and
maketh no exception whether the action bee
true or vnttrue. It seemeth that the said *Warranc*
more regardeth the generall iustification
of iustice, than the particuler right of the par-
tie: and therefore the proprietie by the *Outla-
ry*, and by the said *Warranc* ordained for ius-
tification of iustice, is altered and is giue to the
king, as befoze appeareth, and that both in law
and in conscience, as well as if the action were
true. And then the partie that is so outlawed
is driuen to sue for his remedy, against him
that hath so caused him to be Outlawed vpon
an vnttrue action.

D. If he haue not sufficient to make recom-
pence, or dye befoze recoverie can be had, what
remedie is had thence. I thinke no remedie:

and

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and for a further declaratiō in this case and in
such other like cases, where the proprietie of
goods may be altered without consent of the owner,
it is to consider that the proprietie of goods
is not giuen to the owners directly by the law
of reason, nor by the law of God, but by the law
of man, and is suffered by the law of reason &
by the law of God so to bee. For at the begin-
ning all goods were in common, but after they
were brought by the law of man into a certain
propertie, so that euerie man might know his
owne: and then when such property is giue by
the law of man, the same law may assigne such
conditions vpon the proprietie as it listeth, so
they be not against the law of God, ne the law
of reason, and may lawfully take away that it
giueth, and appoint how long the proprietie
shall continue. And one condition that goeth
with euery proprietie in this Realme is, if he
that hath the proprietie be outlawed according
to such processe as is ordained by the law, that
he shal forfeit the proprietie vnto the king. And
diuers other cases there be also, whereby pro-
pertie in goods shall bee altered in the law, and
the right in lands and without assent of the
owner, whereof I shall shortly touch some
without saying any authoritie therein, for the
more shortnes. First by a sale in open market
the proprietie is altered. Also goods stolen and
seised for the king, or weined, be forfeit, vlesse
appeale or induement bee sued. Also straites, if
they bee proclaimed, and be not after claimed
by the owner within the yeare, be forfeit, & also
a Decodand is forfeit to whome soeuer the pro-
pertie

perty was before (except it belonged to the King)
 & shal be disposed for the soule of him that was
 slaine therewith: & a fine with a Nonclaime at
 the Common law, was a barre, if claime were
 not made within a y^{er}, as it is now by Statute
 if the claime be not made within 4. y^{ears} And
 all these forfeitures were ordained by the law
 vpon certaine considerations which I omit at
 this time, but certaine it is that none of them
 were made vpon a better consideration than
 this forfeiture of M^{ortuor}ary was. For if no es-
 pecial punishment should haue bin ordered for
 offenders that would absent themselves & not
 appeare when they were sued in the Kings
 court, many suits in the Kings courts should
 haue bin of small effect. And sith this Maxime
 was ordeined for the execution of Justice, & as
 much done therein by the common law, as po-
 licie of man could reasonably deuise, to make
 the party haue knowledge of the suit, and now
 is added thereto by the Statute made the 6. y^{ere}
 of H. 8. that a Writ of Proclamation shall bee
 sued if the party be dwelling in another shire:
 it seemeth that such Title as is giuen to the
 King thereby is good in conscience, especially
 seeing that the King is bound to make proces
 vpon the surmise of the plaintife, and may not
 examine but by p^{lea} of the partie, whether
 the surmise bee true or not. But if the partie
 bee returned five times called, where in deede
 hee was neuer called (as in the second case of
 the last Chapter of the said Dialogue in latine
 is contained) then it seemeth the partie shall
 haue good remedy by petition to the King, spe-
 cially

The 4. Chapter.

cially if he that made the returne be not sufficient to make recompence. or by before recovery can be had. D. Now sith I haue heard thine opinion in this case. wherby it appeareth that many things must be seene, or a full and a plain declaration can bee made in this behalfe, & seeing also that the plaine answer to this case, shall giue a great light to diuers other cases that may come by such forfeiture: I pray thee giue me a farther respite, ere that I shew thee my full opinion therein, and hereafter I shall right gladly doe it. And therefore I pray thee proceed now to some other case.

¶ The third question of the Student.

Cap. 4.

If a stranger do Waste in lands & another ho' deeth for terme of life without assent of the tenant for terme of life, whether may he in the reuerſion recover treble damages and the place wasted against the tenant for terme of life according to the statute, in conscience, as he may by the law, if the stranger be not sufficient to make recompence for the waste done. D. Is the law cleere in this case, that he in the reuerſion shall recover against the tenant for terme of life, though that he assented not to the doing of waste. St. Pe. berely, and yet if the tenant for terme of life had been bounden in an obligation in a certaine sum of money that he should do no waste, he should not forfeit his bond by waste of a stranger, and the diuersitie is this.
It

It hath bene vsed as an ancient Maxime in the law, that tenant by the curtesie & tenant in dower should take the land with this charge, that is to say, that they should do no wast the- selves, nor suffer none to be done: and when an action of wast was given after against a tenat for terme of life, then was he taken to be in the same case as to the point of wast, as tenant by the Curtesie, & tenant in Dower was, that is to say, that he should doe no waste, nor suffer none to be done (for there is another Maxime in the Law of Englad, that al cases like vnto other cases shal be iudged after þ same law as other cases be) & sith no reason o' diuersity can be assigned why the tenant for terme of life after an action of wast was given against him, should haue any more fauour in þ law th in the tenant by the Curtesie, or tenant in Dower should: therefore he is put vnder the same Max- im as they be, that is to say, that he shal do no wast, ne suffer none to be done: & so it seemeth that the law in this case doth not consider the abilitie of the person that doth the Wast, whe- ther he be able to make redempce & the wast or not, but the assent of the said tenants wher- by they haue wilfully taken vpon the þ charge to see þ no wast shall be done. D. I haue heard that if houses of these tenants bee destroyed with sodaine tempest, or with strange enemies þ they shal not be charged with wast. S. Trueth it is. Do. And I thinke the reason is because they can haue no recovery ouer, Sr. I take not that for the reason, but that it is an old rea- sonable Maxime in the Law, that they should

The 4. Chapter.

be discharged in these cases, howbeit some will say, that in these cases the law of Reason doth discharge them: & therefore they say, & if a statute were made, that they should be charged in these cases of wast, that & statute were against reason, & not to be observed: but yet neuertheless I take it not so, for they might refuse to take such estate if they would, & if they will take the estate after the law made, it seemeth reasonable that they take it with the charge & with the condition that is appointed thereto by the Law, though hurt might follow to them afterward thereby: for it is oftentimes seene in the law, that the law doth suffer him to haue hurt without help of the law, that will wilfully run into it of his own act not compelled therto, & aduudgeth it his folly so to run into it, for which folly he shal also be many times without remedy in conscience. As if a man take land for term of life, and bindeth himselfe by obligation that he shal leaue & land in as good case as he found it, if the houses be after blowne downe with tempest or destroyed with strange enemies, as in the case that thou hast put before, he shal be bound to repaire them, or els he shal forfeit his Obligation in law & conscience: because it is his owne act to bind him to it, and yet the law would not haue bound him therto, as thou hast said before. So me thinketh, & the cause why the said tenants be discharged in the law in an action of wast, when the houses be destroyed by sodaine tempest, or by strange enemies, is by a special reasonable Maxime in the law whereby they be excepted from the other generall bond, before

before reherſed, that is to ſay, they ſhall at their
 peril ſee that no waſt ſhalbe done, & not by the
 law of reaſon: & ſith there is no maxime in this
 caſe to helpe this tenant, ne that he cannot bee
 holpen by the law of reaſon. it ſeemeth that hee
 ſhalbe charged in this caſe by his own act both
 in law & conſcience, whither the ſtranger be a-
 ble to recompence him or not. D. I doubt in this
 caſe whether the Maxime that thou ſpeakeſt of
 be reaſonable or not, that is to ſay, that tenants
 by the curtelie, & tenants in dower, were bound
 by ſ common law, that they ſhould do no waſt
 themſelues, and ouer that at their perill to ſee
 that no waſt ſhould be done by none other. For
 that law ſeemeth not reaſonable that bindeth a
 man to an impoſſibility. And it is impoſſible to
 prevent, that no waſt ſhalbe done by ſtrangers:
 for it may be ſuddenly done in the night, that the
 tenants can haue no notice of, or by great
 power that they be not able to reſiſt: and there-
 fore me thinketh they ought not to be charged
 in thoſe caſes for the waſt, without they may
 haue good remedie ouer, and then percaſe the
 ſaid maxime were ſufferable, & els me thinketh
 it is a Maxime againſt reaſon. S. As I haue
 ſaid before no man ſhall be compelled to take the
 bond vpon him, but he that wil take the land, &
 if he wil take the land, it is reaſon he take the
 charge as the law hath appointed it: and then
 if any hurt grow to him thereby, it is through
 his owne act and his owne aſſent, for he muſt
 haue reſuſed the leaſe if he wou. d. D. Though
 a man may reſuſe to take eſtate for terme of life,
 or for terme of yeeres, and a woman may reſuſe

The 4. Chapter.

to take her dowry, yet tenant by the Curtesie cannot refuse to take his estate, for immediately after the death of his wife, the possession abideth still in him by the act of the law without entry: & then I put the case that after the death of his wife, he would weine the possession, and after waite were done by a stranger, whether thinkest thou that he should answer to the waite? S. I thinke he should by the law. D. And how standeth that with reason, seeing there is no default in him? S. It was his default, and at his owne perill that he would marry an inheritor, whereupon such daunger might follow. D. I put case that he were within age at the marriage, or that the land descended to his wife after he married her. S. There thou mouest a farther doubt than the first question is: and though it were as thou sayest, yet thou canst not say, but that there is as great default in him, as is in him in the reuerſion, & that there is as great reason why he should be charged with the waite, as that he in the reuerſion should be disinherited and haue no maner remedy, ne yet no profit of the land as the other hath: and though the said maxime may be thought verie strait to the said tenants, yet it is for to be fauoured as much as may be reasonable, because it helpeth much the commonwealth: for it hurteith the commonwealth greatly, when wards and houses be destroyed: and if they should answer for no waite, but for waite done by themselves, there might be waits done by strangers by commandement, or assent in such colourable maner, that they in the reuerſion should neuer haue proofe
of

of their assent, D. I am content thine opinion stand for this time, and I pray thee now proceed to another question.

¶ The 4. question of the Student.

Cap. 5.

If he that is the verie heir be certified by the ordinarie bastard, & after bying an action as heire against another person: whether may anyman knowing the truth, be of counsel with the tenant and plead the said certificat against the demandant by conscience or not? D. Is the law in this case that all other against whom the demandant hath title shall take advantage of this certificat, as well as hee at whose suite he is certified bastard? S. Ye verily, & that for two causes, whereof the one is this. There is an old Maxime in the law, that a mischiefe shalbe rather suffered than an inconvenience: & then in this case if another writ should afterward be sent to another Bishop in another action, to certifie whether he were bastard or not, peradventure the Bishop would certifie & hee were mulier, that is to say, lawfully begotten, & then he should recover as heire, & so he should in one selfe court be taken as mulier and bastard: for avoiding of which contrarietie, the law will suffer no more writs to go forth in that case, & suffereth also all men to take advantage of the certificat, rather than to suffer such a contradiction in the court, which in & law is called an inconvenience, & the other cause is, because this

I iij certifi-

The 5. Chapter.

X
 Certificat of the bishop, is the highest triall that
 is in the Law in this behalfe, but this is not
 vnderstood, but where bastardie is laid in one
 that is party to the writ: for if bastardie be laid
 in one that is a stranger to the writ, as if vou-
 cher pray in aid or such other, then that bas-
 tardy shalbe tried by xij. men, by which triall he in
 Whom the bastardy is laid, shall not be conclu-
 ded, because he is not prou to the triall, & may
 haue no attaint, but he that is party to the issue
 may haue attaint, and therefore he shal be con-
 cluded & none other but he: & forasmuch as the
 said maxime was ordeined to eschue an incon-
 uenience (as befoze appeareth) it seemeth that
 every man learned, may with conscience plead
 the said certificat for auoiding thereof, & giue
 counsaile therein to the party according vnto
 the law, for els the said inconueniency must
 needs follow. Yet yet neuerthelesse I do not
 mean therby, & the party may after when hee
 hath barred the demandant by the said certi-
 ficat, retain the land in conscience by reason of
 the said certificat: for though there be no Law
 to cope'l him to restore it, yet I think wel that
 hee in conscience is bound to restore it, if hee
 knew & the demandant is the verie true heire,
 whercof I haue put diuers cases like in the
 xij. Chapter of our first Dialogue in Latine,
 but my intēt is that a man learned in the law
 in this case and other like may with consi-
 deration giue his counsel according to the law, in auoi-
 ding of such things as the law thinketh should
 for a reasonable cause be eschewed. D. Though
 he that doth not know whether he bee bastard

as not, may giue his counsaile, & also plead the
 said certificat : yet I thinke that he that doth
 know himselfe to be the verie true heire may
 not plead it, and that is for two causes, wher-
 of the one is this : Every man is bound by
 law of reason to do as he would be done to, but
 I thinke that if he that pleadeth that certificat
 were in like case, he would thinke that no man
 knowing the certificat to bee vnttrue, might
 with conscience plead it against him. Where-
 fore no more may hee plead it against none o-
 ther : The other cause is this, although the
 certificat bee pleaded, yet is the tenant bounde
 in conscience to make restitution thereof, as
 thou hast said thy selfe, and then in case that he
 would not make restitution, then he that plea-
 deth the ploe, should run thereby in like offence,
 for he hath holpen to set the other man in such
 a liberty that he may chuse whether hee will
 restore the land or not, and so hee shoud put
 himselfe to ieopardy of another mans consci-
 ence. And it is written Ecclesiast. 3. Qui amat
 periculum peribit in illo, that is, he that wil-
 fully will put himselfe in ieopardie to offend,
 shall perish therein. And therefore it is the su-
 rest way to eschew perils, for him that know-
 eth that he is heire, not to plead it. And as for
 the inconuenience that thou saiest must needs
 follow, but the certificat bee pleaded : As to
 that it may bee answered, that it may bee
 pleaded by some other that knoweth not that
 he is very heire, & if the case be so far put, that
 there is none other learned there but he, then
 me thinketh that he shall rather suffer the said
 incon-

The 6. Chapter.

Inconuenience, the to hurt his owne conscience, for alway charitie beginneth at himselfe, and so euery man ought to suffer all other offences rather than he himselfe would offend. And now that thou knowest mine opinion in this case, I pray thee proceed to another question.

¶ The 5 question of the Student.

Cap 6.

Whether may a man with conscience bee of counsell with the plaintife in an action at the common law, knowing that the defendāt hath sufficient matter in conscience whereby he may be discharged by a sub pena in *h* Chancery, which he cannot plead at the comon law or not: D. I pray thee put a case thereof in certain, for else *h* question is very general. S. I will put the same case that thou puttest in our first dialogue in latin, the *x*. Chapter, that is to say: If a man bound in an Obligation pay the money, and take *h* no acquittance, so that by the common law he shalbe compelled to pay the money again, for such consideration, as appeareth in the *xv*. Chap. of the said Dialogue, where it is shewed evidently how the Law in *h* case is made vpon a good reasonable ground, much necessarie for al the people, howbeit, that a man may sometime through his owne default, take hurt therby, wherein I pray thee shew me thine opinion. D. This case seemeth to be like to the case that thou hast next befoze this, *¶* The that knoweth the paymēt to be made doth not as he would be done to, if he giue counsell that an action should be taken to haue it payed againe.

gaine. S. If hee bee sworne to giue counsell according to the Law, as Sericants at the law be, it seemeth hee is bound to giue counsell according to the Law, for els he should not performe his oath. D. In these words (according to the Law) is vnderstood the law of God, and the law of reason, aswel as the law & customes of the Realme, for as thou hast said thy selfe in our first dialogue in latin, that the law of god, & the law of reason, bee two speciall grounds of the laws of England, wherefore as me thinketh, he may giue no counsel (sauiug his oath) neither against the law of God, nor the law of reason. And certaine it is that this article, that is to say, that a mā shal do as he would be done to, is grounded vpon both the said laws. And first that it is grounded vpon the Law of reason, it is euident of it selfe. And in the 6. Chapter of Saint Luke, it is said, Et prout vultis ut faciant vobis homines, & vos facite illis similiter, that is to say, All that other men should do to you, do you to them, & so it is grounded vpon the Law of God, wherefore if he should giue counsell against the defendant in that case, hee should do against both the said laws. S. If the defendunt had no other remedie but the commō law, I would agree wel it were as thou saist, but in this case he may haue good remedie by a Subpena, and this is the way that shal induce him directly to his subpena, that is to say, when it appeareth that the plaintife shall recover by Law. Doct. Though the defendant may bee discharged by subpena, yet the bringing in of his praesces there, will be to y charge
of

The 7. Chapter.

of the defendant, and also the prover may dye
or they come in. Also there is a ground in the
law of reason, *Quod nihil possumus contra ve-*
ritatem, (that is) we may do nothing against
the truth, and sith he knoweth it is truth that
the money is paid, hee may do nothing against
the truth, and if he should bee of counsell with
the plaintife, he must suppose and auerre that
it is the verie due debt of the plaintife, and that
the defendant withholdeth it from him unlaw-
fully, which he knoweth himselfe to be untrue:
Wherefore he may not with conscience in this
case be of counsell with the plaintife, knowing
that the plaintife is paid already, wherefore if
thou be contented with this answer, I pray
thee proceed to some other question. S. I will
with good will.

¶ The 7 question of the Student.

Cap. 7.

A Man maketh a scoffmēt to the vse of him
and of his heirs, and after the scoffor putteth
in his beasts to manure the ground, and the
scoffee taketh the same as damages felon, and putteth
the same in pound, and the scoffor bringeth an action of
trespass against him for entering into his ground
&c. whether may any man knowing the said
vse, be of counsell with the scoffor to avoid the
action? D. May he by the common law avoid
that action, seeing that the scoffor ought in con-
science to haue the profits? S. Yes verily, for as
to the common Law the whole interest is in
the

the feoffee, and if the feoffee will breake his conscience, and take the profits, the feoffour hath no remedie by the common law, but is driven in that case to sue for his remedie by Subpœna for the profits, and to cause him to refoffe him againe, & that was sometime the most common case where the Subpœna was sued, that is to say, before the Statute of R. 3. but sith the Statute, the feffor may lawfully make a feoffmēt. But neuerthelesse for the profits receiued, the feffor hath yet no remedie but by Subpœna as he had before the said Statute. And so the suppoſel of this action of trespass is vnttrue in euery point, as to the common law.

D. Though the actiō be vnttrue, as to the law, yet he that sueth it ought in conscience to haue that he demandeth by the action, that is to say, damages for the profits, and as it saith no mā may with conscience giue counsell, against that he knoweth conscience would haue done. S. Though conscience would hee should haue the profits, yet conscience will not that for the attaining thereof the feoffour should make an vnttrue surmise. Therefore against the vnttrue surmise euery man may with conscience giue his counsell, for in that dooing he resisteth not the plaintife to haue the profits, but hee withstandeth him that he should not maintaine an vnttrue action for the profits. And it sufficeth not in the Law, ne yet in conscience as me seemeth, that a man hath right to that hee sueth for, but that also hee sue by a iust meanes, and that he hath both good right, and also a good and a true conueyance to come to his right: for

The 7. Chapter.

If a man haue right to lands, as heire to his fa-
 ther, and he will bring an action as heire to his
 mother that neuer had right, euery man may
 geue counsell against the actiō, though he know
 he haue right by another meanes, and so as me
 thinketh he may do in dilatories, whereby the
 partie may take hurt if it were not pleaded,
 though he know the plaintife haue right: as if
 the partie or the towne be misnamed, or if the
 degrees in writs of Entie be mistakē, but if the
 party should take no hurt by admytting of a di-
 latory, there hee that knoweth that the plain-
 tife hath right, may not plead that dilatorie
 with conscience: As in a Formedon to plead in
 Abatement of the Writ, because hee hath not
 made himselfe heir to him that was last scised,
 or in a Writ of right for that the demandant
 had omitted one þe tended right, ne such other,
 ne he may not assent to the casting of an essoin,
 nor protection for him, if hee know that the de-
 mandant hath right, ne he may not vouch for
 him, except it be that he knoweth that þe tenant
 hath a true cause of a voucher, & of lien, & that
 he doth it to bring him thereto, and in like wise
 he may not pray in aid for him, vntles he know
 the praye haue good cause of voucher & lien or
 uer, or that he know that the praye hath some-
 what to plead that the tenant may not plead,
 as villeine in the demandant, or such other. D.
 Though the plaintife hath brought an action
 that is untrue & not maintainable in the Law,
 yet the defendant doeth wrong to the plaintife
 in the withholding of the profits aswell before
 the action brought as hanging the action, and
 that

that wrong as it seemeth the counsaillor dooth maintaine, & also sheweth himselfe to fauor & party in that wrong when he giueth counsaile against the action. 8. If the plaintife doe take that for a fauor & a maintenance of his wrong, he iudgeth farther than the cause is giuen, so that the counsaillor do no more but giue counsaile against the action, for though he giue him counsaile to withstand the action for the vntreuth of it, and that hee should not consente it & to make threby a fine to the King without cause, yet it may stand with reason that hee may giue counsaile to the partie to peeld the profits: and therfore I thinke he may in this case be of counsaile with him at the common law, and be against him in the Chaucerie, and in either Court giue his counsaile without any contrarietie, or hurt of conscience And vpon this ground it is, that a man may with good conscience be of counsaile with him that hath land by descent, or by a disconuinance without title, if he that hath the right bring not his action according to the law, for the recouering of his right in that behalfe.

¶ The seuenth question of the Student.

Cap. 8.

If a man take distress for debt vpon an obligation, or vpon a contract, or such other thing & he hath right title to haue, but & he ought not by law to distraine for it, & neuertheles he keepeth

The 8 .Chapter.

eth the same distresse in pound till he be paid of
 his duty. What restitution is he bound to make
 in this case: whether shal he repay þ money be-
 cause he is come to it by an unlawfull means,
 or onely to restore the party for the wrongfull
 taking of the distress, or for neither, I pray you
 shew me: D. What is the Law in this case: S.
 That he that is distrained may bring a special
 action of trespassse against him þ distraineth, for
 þ he took his beasts wrongfully, & kept them
 till he made a fine, & therefore he shal recover þ
 fine in damages, as he shal do for the residue of
 trespass: for the taking of the money by such cō-
 pulsion is takē in þ law but as a fine wrong-
 fully taken, though it be his duty to have it.
 D. Yet though he may so recover, me thinketh
 that as to the repayment of the money he is not
 bound thereto in conscience, so that he take no
 more thā of right he ought to have for though
 he come to it by an uniuersall meane, yet when the
 money is paid him, it is his of right, & he is not
 bound to repay it, vnles it be recovered as thou
 saidst, & then when he hath repaid it, hee is as
 me thinketh restored to his first action: but to
 the redeliuery of the beasts with such damages
 & such hurt as he hath by þ distress, I suppose
 he is bound to make recōpēce of thē in cōscience
 without cōpulsion or suit in þ law: for though
 he might lawfully haue sued for his duty in
 such maner as the law hath ordred, yet I agree
 well that he may not take vpon him to be his
 owne iudge, and to come to his duty against
 the order of the Law, and therefore if any hurt
 come to the party by the disorder, he is bound to
 restore

restore it. But I wold think it were the more doubt if a man toke such a distresse for a trespass done to him, and keepeth the distresse till amends be made for the trespass: for in that case the damages be not in certain, but be arbitrarie either by the assent of the parties or by iudicē: and it seemeth that there is no assent of the partie in this case, specially no free assent, for that he doth is by compulsion and to haue his distresse againe, & so his assent is not much to be pondered in that case, for all his assenting of him that toke the distresse, & so he hath made himselfe his owne Judge and that is prohibited in all lawes: but in that case where the distresse is take for debt, he is not his owne iudge for the debt was iudged in certaine before by the first contract, and therefore some thinke great diuersitie betwixt the cases. Se. By that reason it seemeth, that if he that distraineth in the first case for the debt take any thing for his damages, that he is bound in conscience to restore it againe, for damages be arbitrarie, and not certaine no more than trespass is, & me seemeth that both in the case of trespass & debt, he is bound in conscience to restore that he taketh, for though hee ought in right to haue like sum as hee receiveth, yet he ought not to haue the money that he receiveth, for hee came to the money by an vnjust meanes, wherefore it seemeth he ought to restore it againe. D. And if hee should be compelled to restore it againe, should he not yet (for that he receiued it once) be barred of his first action notwithstanding the payment?

The 9. Chapter.

S. I will not at this time clerly assoile thee that questiō, but this I wil say, that if any hurt come to him thereby, it is through his own default, for that he would do against the law: but neuerthelesse a little I will say to thy questiō, that as mā seemeth when he hath repaid the mony, that he is restozed to his first action. As if a man condemned in an actiō of trespass pay the money, and after the defendand reuerse the iudgement by a writ of Error, and haue his money repaid, then the plaintife is restozed to his first action. And therfore if he that in this case toke the money, restoze that he tok by the wrongfull distresse, or that he ordered the matter so liberally, that the other murmur not, ne complaine not at it, me seemeth he did very wel to be sure in conscience: & therfore I would aduise euery man to bee wel ware how hee distraineth in such cases against the law. D. Thy counsel is good, & I note much in this case that the party may haue an actiō of trespass against him that distraineth, so that he is taken in the law but as a wrong doer, & therfore to pay the money again is the sure way, as thou hast said before. And I pray thee now shew me for what a man may lawfully distrain as thou thinkest.

¶ For what thing a man may lawfully distraine.

Cap. 9.

A Man may lawfully distraine for a Rent se. uice, and for all maner of seruices, as homage,

mage, Fealtie, Escuage, suit of Court, relieves,
and such other. Also for a rent reserved upon
a gift in taile, a lease for terme of life, for yeeres,
or at will, if he reserve the reversion, the lessor
shall distraine of common right, though there
be no distress spoken of. But in case a man
make a feoffment and that in fee by Inden-
ture, reserving a rent, he shall not distraine for
that rent unless a distress be expressly reserved:
and if the feoffment bee made without
a deed reserving a rent, that reservation is
void in Law, and he shall have the rent on-
ly in conscience, and shall not distraine for it.
And like Law is where a gift in taile or a
lease for terme of life is made, the remainder
over in fee reserving a rent, that reservation is
void in law.

Also if a man seised of land for terme of life
graunteth away his whole estate, reserving
a rent, that reservation is void in the Law,
without it be by Indenture, and if it be by In-
denture, yet he shall not distraine for the rent
but a distress be reserved. Also for Amercia-
ment in a Lette, the Lord shall distraine. But
for Amerciaiment in a Court baron he shall not
distraine.

Also if a man make a lease at Michaelmas
for a yeare, reserving a rent payable at the feast
of the Annuntiation of our Lady and Saint
Mich. the Archangell, in that case he shall di-
straine for the rent due at our Lady day, but
not for the rent due at Michaelmas, because
the terme is expired.

But if a man make a lease at the feast of

R. 9.

Christ:

The 9. Chapter.

Christmas for to endure to the feast of Christmas next following, that is to say for a yeare reseruing a rent at the aforesaid feast of the Annunciation of our Lady and Saint Michael the Archangel, there he shall distraine for both the rents as long as the terme continued, that is to say, till that aforesaid feast of Christmas.

And if a man haue land for terme of life of John at Stoke, & maketh a lease for terme of yeeres reseruing a rent, the rent is behind, and John at Stoke dieth, there he shall not distraine because his reuerſion is determined.

Also if he to whose vse feoffors bin seised maketh a lease for terme of yeeres, or for terme of life, or a gift in taile reseruing a rent, there the reseruatiō is good and the lessour shall distraine.

And if a toſonſhip be amerced & the neighbours by assent asseſſe a certaine summe vpon euery inhabitant, & agree that if it be not paid by such a day, that certaine persons thereto assigned shall distraine: In this case the distress is lawfull. If Lord and Tenant be, and if the tenant do hold of the Lord by fealtie and rent, and the lord doth graunt away the fealtie reseruing the rent, and the tenant attourneth, in this case, he that was lord may not distraine for the rent, for it is become a rent secke. But if a man make a gift in taile to another, reseruing fealtie & certaine rent, and after that hee graunteth away the fealtie reseruing the rent and the reuerſion to himselfe, in this case hee shall distraine for the rent, for the grant of the fealtie

fealtie is void, for the fealtie cannot bee seuered from the reuerſion. Also for heriote ſer-
uice the Lord ſhal diſtrain, & for heriot cuſtom
he ſhall leaſe & not diſtaine. Also if a rent bee
aſſigned to make a partition or aſſignment of
Dower egall, he or ſhe to whom that rent is
aſſigned may diſtaine: and in all theſe caſes a-
boveſaid, where a man may diſtaine, hee may
not diſtaine in the night, but for damages ſea-
ſant, that is to ſay, where beaſts doe hurt in
his ground he may diſtaine in the night. Also
for waſtes, for reparations, for accompts, for
debts vpon contracts, or ſuch other, no man
may lawfully diſtaine.

¶ The 8. queſtion of the Student.

Cap. 10.

If a man doe treſpaſſe, and after make his
executors, and die before any amends made:
whether be his executors bound in conſcience
to make amends for the treſpaſſe if they haue
ſufficient goods thereto, though there be no re-
medy againſt them by the law to compel them
to it? Do. It is no doubt but they are bound
thereto in conſcience, before any other deed in
charitie, that they may do for him of their own
denotion. Sc. Then would I wit, if the teſta-
tour made legacies by his will, whether the
executors be bound to doe firſt, that is to ſay,
to make amends for the treſpaſſe, or to pay
the legacies, in caſe they haue no goods to doe
both? D. To pay legacies: for if they ſhould firſt
make

The 10. Chapter.

make recompence for the Trespasse and then haue not sufficient to pay the Legacies, they should be taken in the law as walkers of their testators goods: for they were not compellable by no law to make amends for the trespass, because every trespass dyeth with the person, but the legacies they should be compelled by the law spirituall to fulfill, and so they should be compelled to pay the Legacies of their owne goods, and they shall not be compelled thereto by no law ne conscience: but if the case were that he leaue sufficient goods to do both, then me thinketh they be bound to do both, and that they be bound to make amends for the Trespasse, before they may doe any other charitable deed for the Testator of their owne minde, as I haue said before, except the funeral expences that be necessary, which must be allowed before all other things. S. And what the prouing of the Testament:

3 Cro
409.

D. The Ordinarie may nothing take by conscience therefore, if there be not sufficient goods besides for the funerals, to pay the debts, & to make restitution. And in likewise the Executors be bound, to pay debts vpon a simple contract, before any other deed of charitie, that they may doe for their Testator of their owne deuotion, though they shall not be compelled thereto by the Law. S. And whether thinkest thou that they be bound to doe first, that is to say, to make amends for the trespass, or to pay the debts vpon a simple contract. D. To pay the debts, for that is certaine and the trespass is arbitrable.

S. Then

S. Then for the plainer declaration of this matter and other like, I pray the shew me thy mind, by what law it is, that if a man make executors, and that the executors if they take upon them be bound to performe the will, and dispose the goods that remaine for the Testator. Do. I thinke that it is best by the law of reason. S. And mee thinketh that it should bee rather by the custome of the Realme. D. In all Countries and in all lands they make Executors. S. That seemeth to be rather by a general custome, after that the law and custome of propertie was brought in, than by the law of reason: for as long as al things were in common, there were no executors ne wills, ne they needed not them, and when propertie was after brought in, me thinketh that yet making of executors, and disposing of goods by will, after a mans death, followeth not necessarily therupon: for it might haue bin made for a law, that a man should haue had the propertie of his goods only during his life, and that the his debts paid, all his goods to haue been left to his wife and children, or next of his kin, without any legacies making thereof, and so might it now bee ordained by statute, and the statute good & not against reason: wherfore it appeareth that executors haue no authoritie by the Law of reason, but by the Law of man. And by the old Law and custome of the Realme a man may make executors and dispose his goods by his will, and then his executors shall haue the execution thereof, and his heires shall haue nothing, but if any particuler custome helpe: and

The 10. Chapter.

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 the executors shall also haue the whole possession, and dispositiō of all his goods and chattels aswel real as personal, though no word bee expressly spoken in the will, that they shall haue them: and they shal haue also actions to recover al debts due to þ testator, though all debts & legacies of the testator be paid befoze, & shall haue the disposition of them to the vse of the testator, & not to their own vse: and so me thinketh that the authoritie to make executors, and that they shall dispose the goods for the testator, is by the custome of the Realme: But then I thinke as thou saist, that by the Law of God they shall be bound to do the first, that is to the most profit of the soule of their testatour where the disposition therof is left to their discretion, and that I agree well, is to pay debts vpon contracts, & to make amends for wrong done by þ testator, though they be not compelled thereto by the law & custome of the Realme, if there be none other debt nor legacie that they be bound to pay by the law: but if two seuerall debts bee payable by the law, then which debt they shal do first in conscience, I am somewhat in doubt. D. Let vs first know what the common law is therein. S. The common law is, þ the testator owe x. l. to two men seuerally by Obligation, or by such other maner that an action lyeth against his Executors thereof by the Law, and he leaueth goods to pay the one and not both, that in that case he that can first obtaine his Iudgement against the Executors, shall haue execution of the whole, and the other shall haue nothing, but to which of them

then he shall in conscience owe his fauour, the common Law teacheth not. D. Therein must be considered the cause why the debts began, & then he must after conscience, beare his lawfull fauour to him that hath the clearest cause of debt, and if both haue like cause, then in conscience hee must beare his fauour where is most need and greatest charitie.

St. May the executors in that case delay that action that is first taken, if it stand not with so good conscience to bee paid, as another debt whereof no action is brought, and procure that an action may be brought thereof, and then to confesse that action, that he may so haue execution, and then the executors to be discharged against the other: D. Why may he not in that case pay thother without action, and so bee discharged in the law against the first:

Seu. No verily, for after an action is taken, the executor may not minister the goods so, but that hee leaue so much as shall pay the debt, whereof the action is taken: and if hee do not, hee shall pay it of his owne goods, except an other reconer, and haue Iudgement against him hanging that action, and that without co-
uin.

v: m: R. 277.

D. Then to answer to thy question, I thinke that by delays that bee lawfull, as by Essom, Emparlance, or by Dilatorie plea in abatement of the writ that is true, he may delay it: but he may plead no vnttrue plea to preferre the other to his ductie. But I pray thee, what is the law of legacies, restitution, & debts, vpon contracts, that percase ought rather after charitie

The 10. Chapter.

to be paid than a debt vpon an obligatiō, what
may the fauor of the Executor doe in these ca-
ses: S. Nothing: for if they either performe le-
gacies, make restitutions, or pay debts vpon
contracts, and keepe not sufficient to pay debts
which they are compellable by the law to pay,
that shalbe taken as a Deuassaucunt bona te-
statoris, that is to say, that they haue wasted
the goods of their testator: and therefore they
shalbe compelled to pay the debts of their owne
goods: & so it is if they pay a debt vpon an obli-
gation, whereof the day is yet to come, though
it be the cleerer debt, and that bee the more cha-
ritie to haue it paid. D. Yet in that case if hee to
whom the debt is already owing, forbear til
after the day of the other obligation is past,
then he may pay him without danger. S. That
is true, if there be no action taken vpon it, and
though there be, yet if that action may bee de-
layed by lawfull meanes, as thou hast spoken
of before, til after the day, and that an action is
taken vpon it, then may the executors confesse
the action, and then after Iudgement hee may
pay the debt without danger of the law. D. Is
not that confessing of the action so done of pur-
pose, a couin in the law: St. No verily, for cou-
uin is where the action is untrue, & not where
the Executors beare a lawfull fauor. Do. The
Ordinarie vpon the accompt in all the case be-
fore rehearsed, will regard much what is best
for the Testator. St. But hee may not driue
them to accompt against the order of the com-
mon Law.

Cap. II.

A Man is indebted to another by a simple contract in xx. l. & he maketh his will & bequeatheth xx. l. to H. Hart & dieth, and leaueth goods to his executors only to burye him with, and to performe the said legacie, and after the said executors deliuer the goods of their Testatour in performance of the said bequest: Whether is hee to whom the bequest is made, bound in conscience to pay the said debt vpon the simple contract, or not? D. Is hee not bound thereto by the Law? S. No verily. D. And what thinkest thou hee is in conscience? S. I think that he is not bound thereto in conscience, for he is neither Ordinarie, Administratour, nor Executoar. And I haue not heard that any man is bound to pay debts of any man that is deceased, but he be one of those three: for the goods that the testatour left to the executors were neuer charged with the debt, but the person of the Testatour while he liued was only charged with the debt, and not his goods, and his executors that represent his estate after his death, having goods thereto of the testatour, be charged also with the debts, and not the goods. And therefore if an executor giue away or sell all the goods of the Testatour, or otherwise wast them, hee that hath the goods is not charged with the debts in Law nor conscience, but the Executor shall bee charged of his owne goods

The 11. Chapter.

goods. And in likewise if Jo. at Stoke owe to A. B. xx. l. and A. B. oweth to C. D. xx. l. and after A. B. dieth intestate hauing none other goods but the said xx. l. which the said John at Stoke oweth him, yet the said C. D. shall haue no remedie against the said Jo. at Stoke, for he standeth not charged to him in law nor conscience. But the Ordinarie in this case must commit Administration of the goods of the said A. B. And the said Administratour must leuy the mony of the said John at Stoke, and pay it to the said C. D. and the said Jo. at Stoke shall not pay it himselfe, because hee is not charged therewith to him: and no more mee thinketh in this case, that he to whom the bequest is made, is neither charged to him that the money was owing to, in the Law or conscience. D. Then shew mee thy minde by what law it is grounded as thou thinkest that Executors be bound to pay debts before legacies: whether it is by the law of God, or by the law of reason, or by the Law of man, as thou thinkest: S. I thinke that it is both by the law of reason, & by the law of God: for reason will that they shal doe first that is best for the testator, and that is to pay debts that their testator is bound to pay, before legacies, that hee is not bound to. And also by the law of God, they are bound to pay the debts first: for sith they are bound by the law of God to loue their neighbour, they are bound to do for him that shal be best for him: when they haue taken the charge thereto, as Executors doe when they agree to take the charge of the Will of their Testatour
vpon

upon them: and it is better for the testator that his debts be paid (wherefore his soule that suffer paine) than that his legacies be performed, wherefore he shall suffer no paine for the performing of them.

And that is to be understood, where the legacy is made of his own free wil, & not where it is made as a satisfaction of any due. And after the saying of S. Gregorie, the verie true proove of loue is the deed. But this man is not in that case, for he took neuer the charge upon him to pay the debts of the Testatour, and therefore he is not bound to them in Law nor conscience as me seemeth: But rather the executors should haue bin ware ere they had paid the legacies, seeing there were debts to pay.

D. The Executors might no otherwise haue done in this case, but to pay the Legacies: for the they should haue bin compelled by the Law to haue paid, and so they could not haue bin to haue paid the debt upon a contract, and therefore they did wel in performing of that legacy: but he to whom the legacy was made ought not to haue taken them, but ought in conscience to haue suffered them, to haue gone to the payment of the debt, & such he did not so but tooke them where he had no right to them, it seemeth that when he tooke them, hee tooke with them the charge in conscience to pay the debt: for such the executors were compellable by the law to performe that bequest and not to pay the debt, therefore when they performed that bequest, they were discharged thereby against him that the debt was owing to, in the Law and conscience,

The II. Chapter.

science, and then the charge resteth vpon him that took the goods where he ought not in conscience to haue taken them: but if it had bin a debt vpon an Obligation, or such other debt, whereupon remedie hath been had against the executors by the law, I there suppose though that the executors had performed the Legacy, that yet he to whom the legacie was made and performed, had not bin charged in conscience to the payment of the debt, for the Executors stand still charged thereto of their owne goods: and he to whom the bequest was made was only bound in conscience to repay that he receiued, to the Executors, because he had no right to haue receiued it, for against the Executors he had no right thereto. *Sci.* Then it seemeth in this case that in likewise he to whom the bequest was made, should repay that he receiued to the Executors, and then they to pay it rather than he. *D.* The executors haue no farther meddling with it as this case is, for when they performed the bequest, they were discharged against both the other in law and conscience, & also he to whom the bequest was made, stand not in this case charged to the executors: for against them he had good title by the law, and so this charge standeth onely against him that the debt is owing to: and the same Law that is in this case vpon a debt vpon a contract is if the testator had done a trespass whereupon he ought to haue made restitution, that is to say, that he to whom the bequest is made, is bound to make the amends for the Trespass: for it should bee no discharge to him to

pay

pay it againe to the Executors without they paid it ouer, & it were vncertaine to him whether they should pay it or not.

And therefore to be out of peril, it is necessary that he pay it himselfe, and then he is surely discharged against all men.

¶ The 10. question of the Student.

Cap. 12.

A Man seised of certain lād in his demesne as of fee, hath issue two sonnes and dieth seised, after whose death a stranger abateh, & taketh the profit, and after the eldest son dyeth without issue, and his brother bringeth an Assise of Mortdauncester as sonne & heire to his father, not making mention of his brother, and recovereth the land with damages from the death of his father, as he may wel by the Law: whether in this case is the younger brother bound in conscience, to pay to the Executors of the eldest brother, the value of the profits of the said land, that belonged to the eldest brother in his life, or not? Doct. what is thine opinion therein? S. That like as the sayd profits belonged of right to the eldest brother in his life, and that hee had full authoritie to haue released aswell the right of the said land, as of the sayd profits, which release should haue bene a clere barre to the younger brother for ever: That the right of the sayd damages
which

The 12. Chapter.

Which be in the Law but a chattell, belong to his executors and not to the heire: for no manner of chattell neither real nor personal shal not after the Law of the Realme descend vnto the heire.

D. Thou saidst in the case next before, that it is not of the Law of reason, that a man shall make executors, & dispose of his goods by his will, & yet the executors shal haue his goods to dispose, but by the law of man: And if it be left to the determination of the law of man, That in such cases as the law giueth such chattels vnto the Executors, they shall haue good right vnto them, and in such cases as the Law taketh such chattels from them, they been rightfully taken from them: And therefore it is thought by many, that if a man sue a Writ of right of Ward of a ward that hee hath by his owne fee, and dieth hanging the writ, and his heire sue a Resummons according to the Statute of West. second, and reuiereth: that in that case the heire shall enioy the Wardship against the executors, and yet it is but a chattell: and they take the reason to be, because of the sayd Statute, and so might it be ordainet by Statute that all wards should go to the heyres, and not to the Executors: Right so in this case, sith the Law is such, that the yonger brother shall in this case haue an Assise of Mortdauncebur as heire to his father, not making any mention of his elder brother, and recouer damages aswel in the tyme of his brother, as in his owne tyme: It appeareth that the Law giueth the right of these damages to the heire, and there-
fore

foze no recompence ought to be made to the ex-
ecutors, as me seem: th: it is not like to a writ
of Aiel, wheras I haue learned in Latin (sith
our first dialogue) the demandant shall recouer
damages only from the death of his father, if
he ouerliue the Aiel: & the cause is, for that the
demandant, though his Aiel ouerliued his fa-
ther, must of necessity make his conuoyance by
his father, and must make himselfe son & heire
to his father, & cosin and heire to his Aiel: and
therefoze in that case if the father ouerliued the
Aiel, the abator were bounden in conscience to
restoze to h^e executors of the father the profits
run in his tunc (for no law taketh them from
him) but otherwise it is in this case, as me see-
meth S. If the yonger brother in this case had
entred into the land without taking any assise
of Mortdancer as he might if hee would, to
whom were the abator then bounden to make
restitution for those profits as thou thinkest:
D. To the executors of the eldest brother: for in
that case there is no law that taketh th^e from
them, & therefore the general ground, which is
that all chattels shall go to the executors, hol-
deith in that case: but in this case that ground is
broken and holdeth not, for the reason that I
haue made before. For commonly there is no
generall ground in the Law so sure, but it fa-
ieth in some particuler case.

¶ The 11. question of the Student.

Cap. 13.

A Man seised of land in fee taketh a wife, and
after alieneth the land, & dyeth, after whose
death

The 13. Chapter.

death his wife asketh her dower, & the aliene refuseth to assigne it vnto her, but after she asketh her Dower again, and he assigneth it vnto her: whether is the aliene in this case bound in conscience, to give the woman damages for the profits of the land after her third part, from the death of her husband, or from the first request of her dower, or neither the one nor the other: D. what is the law in this case: Stu. By the law the woman shall recover no damages, for at the Common law the demandant in a writ of Dower should never have recovered damages: but by the Statute of Merton it is ordeined, that where the husband dieth seised, that the woman shall recover damages which is vnderstood the profits of the land sith the death of her husband, and such damages as she hath by the forbearing of it: but in this case the husband died not seised, wherefore she shall recover no damages by the Law. D. Yet the Law is, that immediatly after the death of her husband the Wife ought of right to have her dower if she aske it, though her husband die not seised. S. That is true.

D. And sith she ought to have her Dower from the death of her husband, it seemeth that she ought in conscience to have also the profits from the death of her husband, though shee have no remedy to come to them by the Law: For me thinketh that this case is like to a case that thou puttest in our first Dialogue in latin, the 17. Chapter: That if a tenant for terme of life be disseised and dye, and the disseisor dye, and his heirs entreaty and taketh the profits,

fits, and after he in the reuerſiō recovereth the lands againſt the heire, as hee ought to doe by the Law, that in that caſe hee ſhall recover no damages by the Law: and yet thou diddeſt agree, that in that caſe the heire is bound in conſcience to pay the damages to the demandant, and ſo me thinketh in that caſe, that the ſcoffee ought in conſcience to pay the damages from the death of her husband, ſeeing that immediately after his death ſhe ought to haue her dower. **Sir.** Though ſhe ought to be indowed immediately after the death of her husband, yet ſhe can lay no default in the ſcoffee till ſhe demand her dower by the ground, and that the tenant be not there to aſſigne it, or if he be there that he will not aſſigne it: for he that hath the poſſeſſion of land whercunto any woman hath title of dower, hath good authoritie as againſt her to take ſo profits till ſhe require her dower: for euery woman that demandeth dower aſſirmeth the poſſeſſion of the tenant as againſt her: and therefore although ſhe recover by action, ſhee leaueſt the reuerſion alway in him againſt whom ſhe recovereth, though he be a diſſeiſor, and bringeth not the reuerſion by her recovery to him that hath right as other tenants for terme of life doe. And for this reaſon it is that the tenant in a **Writ of Dower**, where the husband dyed ſepled, if he appeare the firſt day, may ſay to excuſe himſelfe of damages that hee is and all times hath bene readie to payd Dower if it had bene demanded: and ſo he ſhall not be receiued to do in a **Writ of Coſinage**, neither in the caſe that thou remembreſt

The 13. Chapter.

abone, for in both cases the tenants be supposed by the writ to be wrong doers: but it is not so in this case, and so me thinketh it cleer that the lessee in this case shal neuer be bound by law, nor conscience to yeeld damages for the time he passed before the request, but for the time after the request is greater doubt: howbeit some thinketh him not there bound to yeeld damages, because his title is good, as is said before, & that it is her default that he brought not her action. D. As vnto the time before the request I hold me content with thine opinion, so that he assign the dower whē he is required, but whē he refuseth to assign it, thē I think him bound in conscience to yeeld damages for both times, though she shal none recouer by the law. And first as for the time after the refusall, it appeareth evidently that when hee denied to assigne her dower, he did against conscience: for he did not what he ought to haue done by the law, ne as he would should haue bin done to him, & so after the request he holdeth her dower from her wrongfully, and ought in conscience to yeeld damages therfore. And as to the default he thou assignest in her, that she took not her action, he forcéth little, for actions need not, but wher the party will not do that he ought to do of right. And for what he ought of right to haue done & did it not, hee can take no aduantage: and then as to the damages before the request, me thinketh him also bounden to pay them, for when hee was required to assigne dower & refused, It appeareth that he neuer intended to yeeld dower from the beginning, & so he is a wrong doer in his owne

con-

conscience: & moreover, if \bar{h} husband die seised, the law is such, that if the tenant refuse to assign dower when he is required, wherefore the woman bringeth a writ of dower against him, \bar{h} in that case the woman shall recover damages as well for \bar{h} time before \bar{h} request as after: & yet he ought not in that case after thine opinion to have yielded any manner of damages if hee had bin ready to assign dower whē it was demanded, as some thinketh here. S. The cause in the case that thou hast put, is for that the statute is general that the demandant shall recover damages, where \bar{h} husband died seised, & that statute hath bin alway construed, \bar{h} where the tenant may not say \bar{h} he is, & hath bin alway ready to yield dower to \bar{h} the demandant shall recover damages from the death of her husband. But in that case there is no law of the realm, \bar{h} helpeth for the demandant neither comō law, nor statute: & furthermore though it might be proved by his refusal, \bar{h} he never intended frō the death of the husband to assigne her dower, yet that proueth not, but that hee had good right to take the profits of her third part for the time, as well as he had of his owne two parts, till request be made, as is aforesaid: & so me thinketh \bar{h} notwithstanding the denial, he is not bound to yield damages in this case, but for the time of the request, & not for the time before. D. For this time I am content with thy reason.

¶ The 12. question of the Student.

Cap. 14.

A Man seised of certain lands, knowing that another hath good right & title to them, le-

L. 111.

ueth

The 14. Chapter.

tieth a fine with Proclamation, to the intent he would exting the right of the other man, & the other man maketh no claime within the v. yeares, whether may hee that leuied the fine hold the land in conscience as he may do by the law: D. By this question it seemeth that thou doest agree, that if he that leuied the fine had no knowledge of the other mans right, that his right should then bee exting by the fine in conscience. Siu. Yea verily, for thou diddest shew a reasonable cause why it should be so in our first Dialogue in Latine the 24. Chapter, as there appeareth. But if he that leuied a fine and that would exting the right of another, knew that the other had more right than he, then I doubt therein: for I take thine opinion in our first Dialogue to be vnderstood in conscience, where he that would exting former rights by such a fine with proclamation, knoweth not of any former title, but for his more suerty, if any such former right be, he taketh the remedy that is ordained by the law. D. & whether doest thou meane in this case that thou puttest now that he hath right, knoweth of the fine, wilfully letting the v. yeares passe without claime, or that hee knoweth not any thing of the fine?

Si. I pray thee let mee know thine opinion in both cases, and whether thou thinke that hee that hath right bee barred in eyther of the said cases by conscience as hee is by the Law, or not. D. I will with good will hereafter shew thee my mind therein: but at this time I pray thee giue a little sparing and proceed now

now for this time to some other question.

¶ The 13. question of the Student.

Cap. 15.

A Man seised of certain lands in fee hath a daughter, which is his heir apparat, the daughter taketh a husband, & they haue issue, the father dieth seised, and the husband as sone as he heareth of his death, goeth toward the land to take possession, & befoze he cā come there, his wife dieth, whether ought he to haue the land in cōscience for terme of his life, as tenant by the curtesie, because he hath done h̄ in him was to haue had poss. in his wifes life, so that he might haue bin tenant by the curtesie according to the Law, or that he shall neither haue it by the law, nor conscience? D. Is it clerely holden in the law that he shall not be tenant by the curtesie in this case, because hee had not possession in deed?

S. Ye verily, and yet vpon a possession in law a woman shal haue her dower, but no man shal be tenant by the curtesie of land, without his wife haue possession in deed. D. A man shal be tenant by the curtesie of a rent though his wife dye befoze the day of payment, & in likewise of an Adowson though she dye befoze the avoidance. S. That is truth for the old custom and Maxime of the law is, that he shal be so, but of land there is no Maxime that serueth him but his wife haue possession in deed. D. And what is the reason that there is such a maxime in the

The 15. Chapter.

law of the rent & of the aduowson, neither the
of land when he husband doth as much as in
him is to haue possession and cannot. S. Some
assigne the reason to be because it is impossible
to haue possession in deed of the rent, or of ad-
uowson before the day of payment of the rent,
or before the auowance of the aduowson. D. And
so it is impossible that he should haue possession
in deed of land if his wife die so soon that hee
may not by possibility come to the land after
his fathers death, & in her life as the case is. S.
The law is such as I haue shewed ther before
and I take the very cause to be, for that ther is
a Maxim serueth for the rent and the aduow-
son, and not for ylands as I haue said before,
and as is said in the 8. chap. of our first Dia-
logue, it is not alway necessary to assigne a
reason or consideration why the Maxims of
the law of England were first ordained & ad-
mitted for Maxims, but it sufficeth that they
haue bin alway taken for law, and that they be
neither contrary to the law of reason, nor to the
law of God as this Maxim is not, & therefore
if the husband in this case be not holpen by con-
science, he cannot be holpen by the law. D. And
if the law help him not, conscience cannot help
him in this case, for conscience must alway be
grounded vpon some law, and it cannot in this
case be grounded vpon the law of reason, nor
vpon the law of God, for it is not directly by
those laws that a man shalbe tenant by curie-
sic, but by the custome of the realme. And ther-
fore if the custome help him not, he can nothing
haue in this case by conscience: for conscience
neuer

neuer resisteth the law of man, nor addeth nothing to it, but where þe law of man is in it self directly against the law of reason, or else the law of God, and then properly it cannot bee called a law, but a corruption, or where the general grounds of the law of man worketh in any particuler case against the said lawes as it may doe, & yet the law good, as it appeareth in diuers places in our first dialogue in latine, or els, wher there is no law of mā prouided for him that hath right to a thing by þe law of reason, or by the law of God. And then sometime there is remedy giuen to execute that in conscience, as by a sub pena, but not in al cases: for sometime it shalbe referred to the conscience of the party, & vpon this ground (that is to say) that when there is no title giuen by the common Law, that there is no title by conscience, There be diuers other cases, whereof I shall put some for an example. As if a Reuersion bee granted vnto one, but there is no attornment: or if a new rent be granted by word without deed, there is no remedie by conscience, vnlesse the said grants were made vpon consideration of money, or such other. And in likewise where he that is seised of lands in Fee simple maketh a will therof, that wil is void in conscience, because the ground serueth not for him wherby the conscience should take effect, that is to say, the law. And if the tenant make a Feoffment of the land that he holdeth by priority, & taketh estate againe, and dieth, (his heire within age) the Lord of whom the land was first holdē by priortie, shal haue no remedie, for the body by
con-

The 16. Chapter.

conscience, for the law that first was with him, is now against him, & therefore conscience is altered in likewise as the law altereth. And divers and many cases like bee in the law that were too long to rehearse now. And thus mee thinketh that if the law be as thou saiest, the husband in this case hath neither right by the law, nor conscience.

¶ The 14. question of the Student.

Cap. 16.

A Rent is grated to a mā in fee to perceine of two acres of lād, & after the grātoz enfeoffeth the grauntez of one of the said acres, whether is the whole rent extinct therby in conscience as it is in the law: D. This case is somewhat uncertain: for it appeareth not whether the grātoz enfeoffed him on trust, or that he gave the acre to him of his meer motion, to the vse of the said feoffee, or else that the feoffement was made vpon a bargain, & if it were but only a feoffement of trust, then I think the whole rent abideth in conscience though it bee extinct in the Law: & first that it continueth in that case in conscience, for the part that the grauntez hath to the vse of the grātoz it is extinct, for he may not take the profits of the lād, and it is against conscience that he should take both, & in likewise it abideth in conscience for the acre & remaineth in the hands of the grātoz, though it be extinct in the Law: for there was a default in the grauntoz that he would make the feffement to the grātoz, aswel as there was

was in the grantee to take it. And it is no conscience that of his owne default he should take so great auaille to bee discharged of the whole rent, seeing that the fessement was made to his own vse. And if the fessement were made vpon a bargain & a contract between them, then it is to see whether they remembred the rent in their bargain, or that they remembred it not, & if they remembred it in their bargain & contract, then conscience must follow the bargain: As thus, if they agreed that the grantee should haue the rent after the portio in the other acre, then by conscience he ought to haue it though it bee extincted in the law: And if they agreed that the whole rent should be extinct, and made their price according, then it is extinct in law & conscience: & if they cleerly forgot it & made no mention of it, or for lacke of cunning took the Law to be, that it should continue in the other acre after the portion, and made their price according, pondering onely the value of the acre that was sold, then me thinketh it doth continue in conscience after the portio: & if the fessement were made to the vse of the grantee, then it seemeth the whole rent is extinct in law and conscience. Sr. The take this to be the case, that is to say, that the fessement was made to the vse of the grantee. D. What is the thine opinion therin? S. That the rent should abide in conscience after the portion of the acre remaining in the hands of the grantor, notwithstanding it be extinct in the law. D. Then shew me thine opinion in this that I shal aske thee: Of what law is it that graunts of rent and of such other

pro:

The 16. Chapter.

profits out of lāds may be made, and that they
 shalbe good & effectual to the granters, whether
 it is by the law of reason, or by the law of god,
 or by the custom & law of the realm. S. I think
 it is by the law of reason: for by the same reason
 that a mā may giue away al his lands, he may
 as it seemeth giue away the profits thereof, or
 graunt a rent out of the land if he will. D. But
 then by what Law is it that a man may giue
 away his lāds: I trow by none other law but
 by the custome of the Realme, for by statute all
 alienations and gifts of lands may be prohibi-
 ted, & the that reason proueth not that graunts
 of the profits of land or of a rent, should be good
 because he may alien the land: if alienation of
 land be by custome & not by the law of Rea-
 son, as I suppose it is, whereof I haue tou-
 ched somewhat in our first Dialogue in Latin
 the 19. Chapter. And also if Graunts should
 haue their effect by the Law of Reason, then
 Reason would they should be good by the only
 sword of the grauntoz, as well as by his deed.
 And that is not so, for without deed the grant
 of rent is void in law: and so me thinketh that
 graunts haue their effect onely by the Law of
 the Realme. Se. Admit it be so, what meanest
 thou thereby: Do. I shall shew thee hereafter,
 as I shal shew thee the cause why I think the
 rent is extinct in conscience, as wel as in law.
 And first as I take it, the reason why it is ex-
 tinct in the law, is because the rent by the first
 grant was going out of both acres, and was
 not going part out of the one acre, and part out
 of the other, but the whole rent was going out
 of

of both, and then when the grantee of his owne
folly will take estate in the one acre, whereby
that acre is discharged, then the other acre also
must be discharged, vntles it should be appor-
tioned: and the law wil not that any appor-
tionment should be in that case, but rather inso-
much as the partie hath by his owne act discharged
the one acre, the law discharged also the other,
rather than to suffer the other acre to be char-
ged contrarie to the forme of the graunt: For
this rent beginneth all by the act of the partie.
And as I haue heard it is called, a rent against
common right, wherefore it is not fauored in
the law, as a rent seruice is: and then me thin-
keth that forasmuch as it is not grounded by
the law of reason, that grants of rent should be
made out of land, but by custome and law of
the realme, as I haue said before: that so in like
wise it remaineth to the law and custom of the
realme, to determine how long such rents shall
continue. And when the law iudgeth such rent
to bee void, I suppose that so doth conscience
also, except the iudgement of the law be against
the law of Reason or the law of God, as it is
not in this case. For in this case he that taketh
the feoffment hath profit by the feffement, and
knoweth that he hath such a rent out of his land
that this purchase should extinct it, whereby
it appeareth that hee auentureth vnto the Law,
whereto he was not compeiled, and that is his
owne act and his owne default so to do, which
shal extinct his whole rent aswel in conscience
as in law. But if he haue no profit of the land
or be ignorant that hee hath such a rent out of
the

The 16. Chapter.

the land, which is called ignorance of the deed, or if he be ignorant that the Law would extinct his whole rent thereby, which is called ignorance of the law, then mee thinketh it remaineth in conscience after the portion. S. Ignorance of the law or of the deed helpeth not but in few cases in the law of England. Do. And therfore it must be reformed by conscience, that is to say, by the law of reason, for when the general Maxims of the law be in any particular cases against the law of reason, as this Maxim seemeth to be, because it excepteth not the that be ignorant though it bee an ignorance inuincible, the doth it not agree with the law of reason. S. We thinketh that ignorance in this case helpeth little: For when a man buyeth any land or taketh it of the gift of any other, hee taketh it at his peril, so that if the title be not good, ignorance cannot help, for the buyer must beware what hee buyeth: & so in this case if the taking of an acre should extinct the whole rent in conscience, if he were not ignorant, so mee thinketh it should in likewise extinct it also though he be ignorant of the law or of the deed: for every man must be compelled to take notice of his owne title, and out of what land his rent is going, & so mee thinketh ignorance is but little to be considered in this case. D. If a man buy land or taketh it of the gift of another, it is reason that hee take it with the perill, though hee bee ignorant that another hath right: for it were not standing with reason that his ignorance should extinct the right of another, but in this case there is no doubt of the right of the land: but

but al the doubt is how the rent shal be ordred
in conscience, if he that hath the rent take part
of the land: & therein is great diuersitie between
him that is ignorant in the Law, and him that
knoweth the law, & knoweth well also that he
hath a rent out of the land, and other. For I
put case that hee asked counsaile of the graun-
toz himselfe therein, & he saying as he thought,
told him that the taking of the one acre should
not extinct the rent but for the portiō, and so he
thinking the law to be, tooke the other acre of
his gift: Is it not reasonable in that case, that
the ignorance should saue the rent in consci-
ence? S. Yes, for there the grauntoz himselfe is
party to his ignorance, and in maner the cause
therof. D. And me thinketh all is one, if any o-
ther had shewed him so, or if he asked no coun-
saile at all, for me thinketh it sufficeth in this
case that hee bee ignorant of the law: for why,
it is more hard in this case to prouoe. the rent
should be extinct in conscience, though he knew
it should be extinct in the Law, than to prouoe
that it continueth in conscience after the porti-
on if he be ignorant, and thou thy selfe were of
the same opinion, as it appeareth in the begin-
ning of this present Chapter: But if the opi-
nion were true, it would be hard to proue but
that the said generall Maximie were wholly a-
gainst reason, & then it were void, but I haue
sufficiently answered thereto as me seemeth,
& that it is extinct in the Law, & also in consci-
ence, except ignorance help it to be apporcioned.
And moreover, forasmuch as apporcionment
is suffered in the Law, where part of the land

Disce:

The 17. Chapter.

discendeth to the grantee, because no default can be assigned in him: some thinke no default can be assigned in him in conscience, when he is ignorant of the law or of the deed, though such ignorance do not excuse in law of the realme. St. I am content with thy opinion in this behalfe at this time.

¶ The 15. question of the Student.

Cap. 17.

A Man graunteth a Rent charge out of two acres of land, and after the grauntoz incroffeth B. B. in one of the said two acres to the vse of the said B. B. and of his heires, & after the said B. B. intending to extinct all the rent, causeth the said acre to bee recovered against him to his owne vse in a writ of Entry in the Poss in the name of the grauntee and of others after the common course, the grauntee not knowing of it, and by force of the said recovery the other demandants enter and by suing the grauntee, so that the grauntoz is leased of all by the suruivoz to the vse of the said B. B. Whether is the said rent extinct in conscience in part, or in all, or no part? D. I am in doubt of the law in this case. S. In what point? D. Whether the whole rent be going out of the acre that remaineth in the hands of the grauntoz, because the grauntee cometh to the land by way of recovery, or that it shalbe extinct in law but after the portion, because the grauntee hath not the acre to his owne vse, or that the whole

Whole rent shall be extinct in the Law. S. The rent cannot be whole going out of the acre that the grauntoz hath: for this recouerie is vpon a feined title, and the grauntoz because hee is straunge to it shalbe well receiued to falsifie it. But if the Recouery had bene vpon a true title, then it had bene as thou saist, if the grauntee recouer the one acre against the grauntour vpon a true title, the grauntoz shall pay the whole rent out of that land that remaineth in his hand: and as to the vse it maketh no matter to the grauntoz as to the law in whom the vse be: for the possession without the vse extinguisheth the whole rent as against him in the law, aswel as if the possession and vse were both ioyned together in the grauntee.

D. Then me thinketh that the sayd Henry Hart is bound in conscience to pay the grauntee the rent after the portion of that acre that was recouered, for it cannot stand with conscience that he should lose his rent, and haue no profits of the land. S. Then of whom shall hee haue the other portion of his rent? D. Is the law cleere that the acre that the grauntoz hath shall be in this case discharged in the law? S. I take the law so.

D. And what in conscience? S. Is against the grauntoz me thinketh also it is extinct in conscience, for the reason that thou hast made in § 16. Chapter. For it is all one in conscience in this case as against the grauntour, whether the recouerie were to the vse of the grauntee or not, specially seeing that the grauntoz is not priuy to the recouery: for the vniue of possession

The 18. Chapter.

Xis þ cause of extinguiſhment of the rēt againſt the grantor both in law and conſcience, where ſocuer the uſe bee. But if the grauntoz had bin priue to the cauſe of extinguiſhment, as hee was in the caſe that I put in the laſt chapter, where the grantor enfeoffed the grantee of one of the acres to the uſe of the grantee, there it is not extinct in conſcience in that acre that remaineth in the hands of the grantor, though it be extincted in the law, becauſe hee was priue to the extinguiſhment himſelfe: but he is not ſo in this caſe, & therfore it is extinct againſt him in law & conſcience. And therfore me thinketh, that the grantee ſhall in conſcience haue the whole rent of the ſaid D. Hart, that cauſed the ſaid recouerie to be had in his name, for in him was all the default: but it is to be vnderſtood, that in all the caſes, where it is ſaid before in this chapter, or in the chapter next before, that the rent is extinct in the law, and not in conſcience, that in ſuch caſe, all the remedies that the party might firſt haue had for the rent at the common law by diſtreſſe, aſſiſe, or otherwiſe, are determined, & the party that ought to haue the rent in conſcience, ſhall be driuen to ſue for his remedy by ſubpena. D. I am content with thy conceit in this matter for this time.

¶ The 16. queſtion of the Student.

Cap. 18.

AVilleine is granted to a man for terme of life, the villaine purchaſeth lands to him
and

and to his heirs, the tenant for term of life entreteth: in this case by the Law he shal enjoy the lands to him and to his heirs, whether shal he doe so in likewise in conscience?

D. He thinketh it first good to see whether it may stand with Conscience, that one man may claime another to be his villedin, and that he may take from him his lands and goods, & put his body in prison if he will, it seemeth he loveth not his neighbour as himselfe that doth so to him.

Sr. That Law hath bin so long used in this Realme and in other also, and hath bin admitted so long in the Lawes of this Realme, and of diuers other laws also, and hath been affirmed by Bishops, Abbots, Priours, and many other men both Spiritual and Temporal, which haue taken aduantage by the said law, and haue seized the lands and goods of their villedines thereby, and call it their right inheritance so to do: that I thinke it not good now to make a doubt, ne to put it in argument whether it stand with conscience or not, and therefore I pray thee, admitting the law in that behalfe to stand in Conscience, shew me thine opinion in the question that I haue made.

D. Is the law cleere that he that hath the villedin but only for terme of life, shall haue the lands that that villedin purchaseth in fee to him and to his heires.

S. Ye verily I take it so.

D. I should haue takē the law otherwise: for

As if.

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The 18. Chapter.

if a Seignioꝝ be graunted to a man foꝝ terme of life and the tenant attourne, & after the land escheat, and the tenant foꝝ terme of life entreteth, he shal haue there none other estate in the land than he had in ̃ Seignioꝝ: and me thinketh that it should be like law in this case, and that the Lord ought to haue in the land, but such estate as he hath in the villeine. S. The cases bee not alike, foꝝ in the case of the escheate the tenant foꝝ terme of life of the Seignioꝝ, hath the lands in the lieu of the Seignioꝝ, that is to say, in the place of ̃ Seignioꝝ, & the Seignioꝝ is clearly extinct: but in this case he hath not the land in the lieu of the villeine, foꝝ hee shal haue the villeine stil as he had before, but he hath the lands as a profit come by means of the villeine, which he shal haue in like case as the villein had them, that is to say, of all goods and chatels he shal haue the whole property, & of a lease foꝝ terme of yeeres he shal haue the whole terme, and foꝝ terme of life he shal haue the same estate, the Lord shal haue the land during the life of the villein, and of land in fee simple, and of an estate taile that the villeine hath, the Lord shal haue the whole fee simple, although he had the villein but only foꝝ terme of yeeres, so that he enter oꝝ seise according to the law before the villein alien, oꝝ else he shal haue nothing.

D. Merily, and if the law be so, I think conscience followeth the law therein. Foꝝ admitting that a man may with conscience, haue an other man to be his villein, the iudgement of the Law in this case (as to determine what estate the

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the Lord hath in the land by his entrie is nei-
ther against the law of reason nor against the
law of God, and therefore conscience must fol-
low the law of the Realme. But I pray thee
let me make a little digression to heare thine o-
pinion in another case somewhat pertaining
to the question, and it is this: If an Executor
haue a villeine, that his testator had for terme
of yeres, & he purchaseth lands in fee, and the
executor entred into the land, what estat hath
he by his entrie? S. A fee simple, but that shalbe
to the behoofe of the testator, & shalbe an assent
in his hands. D. Wel then I am content with
thy concept at this time in this case, and I
pray thee proceed to another question. S. For
asmuch as it appeareth in this case & in some
other before, that the knowledge of the law of
England is right necessarie for the good orde-
ring of the conscience: I would heare thine o-
pinion, If a man mistake the law, what danger
it is in conscience, for the mistaking of it. D. I
pray thee put some case in certaine therof that
thou doubtest in, & I will with god will shew
thee my minde therein, or else it will be some-
what long or it can be plainly declared, and I
would not be tedious in this writing.

¶ The 17. question of the
Student.

Cap. 19.

A Man hath a Villeine for terme of life, the
villein purchaseth lands in fee as in the case

¶ 19

of

The 19. Chapter.

of the last Chapter, and the tenant for terme of life entereth, and after the Villaine dyeth, he in the reuerſion pretending that the tenant for terme of life hath nothing in the land, but for terme of life of the Villaine, asketh counsaile of one that sheweth him that he hath good right to the land, and that hee may lawfully enter, and throught that counsaile hee in the reuerſion entereth, by reason of the which entry, great suits and expences folloew in the Law, to the great hurt of both parties: What danger is this to him that gaue the counsaile? D. whether meaneſt thou that hee that gaue the counsaile, gaue it willingly against the Law, or that he was ignozant of the Law? Stu. That he was ignozant of the Law: for if he knew the law, and gaue counsaile to the contrarie, I think him bound to restitution, both to him against whom he gaue the counsaile, & also to his client (if he would not haue sued but for his counsaile) of all that they bee damaged by it.

D. Then will I yet further aske thee this question, whether he of whom he asketh counsaile gaue himselfe to learning, and to haue knowledge of the law after his capacitie, or that he tooke vpon him to giue counsaile, and tooke no studie competent to haue learning: for if he did so, I think he be bounden in conscience to restitution of all the costs and damages that he sustained, to whom hee gaue counsaile, if he would not haue sued but throught his counsaile, and also to the other partie. But if a man that hath taken sufficient study

in the law, mistake the law in some point that is hard to come to the knowledge of, hee is not bounden to such restitution, for he hath done & in him is: but if such a man knowing the Law giue counsell against the law, hee is bound in conscience to restitution of costs and damages (as thou hast said before) and also to make amends for the vntruth.

Sc. What if he aske counsell of one that hee knoweth is not learned, and hee giueth him counsell in this case to enter, by force whereof he entred? Do. Then bee they both bound in conscience to restitution, that is to say, the partie if he be sufficient, and else the Councellour because he assented and gaue counsell to the wrong.

Sc. But what is the Councelloz in that case bounden to him that hee gaue counsell to? Do. To nothing: For there was as much default in him that asked the counsell, as in him that gaue it, for he asked counsell of him that hee knew was ignorant, and in the other was default for the presumption, that hee would take vpon him to giue counsell in that hee was ignorant.

Sc. But what if hee that gaue the counsell, knew not but that he that asked it, had trust in him, that he could and would giue him good counsell, and that he asked counsell for to order well his conscience, notwithstanding that the trueth was, that he could not so do?

D. Then is he that gaue the counsell bounden to offer to the other amends, but yet the other may not take it in conscience.

¶ iij.

S. That

The 19. Chapter.

S. That were somewhat perilous, For haply he would take it though he haue no right to it, except the world be wel amended. D. What thinkest thou in that amendment? Stu. I trust every man will doe now in this world as they would be done to, speake as they think, restore where they haue done wrong, refuse money if they haue no right to it, though it bee offered them, do that they ought to do by conscience, & though that they cannot be compelled to it by no Law, and that none will giue counsell, but that they shal thinke to be according to conscience, and if they do, to do what they can to reforme it, and not to intermit themselves with such matters as they be ignorant in, but in such cases to send them that aske the counsell to other, that they shall thinke bee more cunning than they are.

D. It were very wel if it were as thou hast sayd, but the more pittie, it is not alway so. And especially there is great default in giuers of counsell, for some for their owne lucre and profit giue counsel to comfort other to sue that they know haue no right, but I trust there bee but few of them: and some for dread, some for fauor, some for malice, and some vpon considerations, and to haue as much done for them an other time to hide his truth. And some take vpon them to giue counsell in that they bee ignorant in, and yet when they know the truth will not withdraw that they haue misdone, for they thinke it should be greatly to their rebuke, and such persons follow not this counsel, that saith That we haue vnadvisedly done, let vs with
good

good aduise reuoke again. S. And if a man giue counsell in this Realme after as his learning and conscience giueth him, and regardeth not the Lawes of the Realme, giueth he good counsell: Do. If the law of the Realme bee not in that case against the law of God, nor against the law of reason, hee giueth good counsell: For euery man is bound to follow the law of the countrey where he is, so it be not against the said lawes, and so may the cases be, that he may bind himselfe to restitution. S. At this time I wil no further trouble thee in this question.

¶ The 18. question of the Student.

Cap. 20.

If a man of his meire motion giue lands to D. H. and to his heires by Indenture, vpon a condition, that he shall yerely at a certaine day pay to Jo. at Stile out of the same land a certaine Rent, and if hee do not, that then it shalbe lawfull to the said Jo. at Stile to enter &c. if the rent in this case be not paid to John at Stile, whether may the said John at Stile enter into the lands by conscience, though hee may not enter by the law? D. May he not enter in this case by the Law, sith the words of the Indenture be that he shall enter? S. No verily, For there is an auncient Maxime in the Law, that no man shall take aduantage in a condition, but he that is partie or priue to the condition, and this man is not party nor priue where:

The 20. Chapter.

Wherefoze he shall haue no aduantage of it. D.
 Though hee can haue no aduantage of it as
 party, yet because it appeareth evidently that
 the intent of the giuer was, that if hee were
 not paid of the rent, that hee should haue the
 land: It seemeth that in conscience he ought to
 haue it, though he cannot haue it by the law.
 S. In many cases the intent of the partie, is
 void to all intents, if it be not grounded accor-
 ding to the law: And therefore if a man make
 a lease to another for terme of life, and after of
 his more motion he confirmeth his estate for
 terme of life to remaine after his death to ano-
 ther, and to his heires. In this case that re-
 mainder is void in law and conscience, for by
 the law there can no remainder depend vpon
 no estate, but that the same estate beginneth at
 the same time that the remainder doth: And in
 this case the estate began before, and the confir-
 mation enlarged not his estate, nor gaue him
 no new estate. But if a lease be made to a man
 for terme of another mans life, and after the
 lessoz only of his more motion confirmeth the
 land to the lessee for terme of his owne life,
 the remainder ouer in fee, this is a good re-
 mainder in the law and conscience, and so mee
 thinketh the intent of the partie shall not bee
 regarded in this case. Do. And in the first case
 that thou hast put, mee thinketh though it passe
 not by way of graunt of that, yet shall it passe,
 as by the way of remainder of the reuerſion,
 for euery deed shalbe take most strong against
 the grauntoz, and the taking of the deed in this
 case is an attornment in it selfe. Sc. That can-

not be, for hee in the remainder is not party to the deed, and therefore it cannot be taken by way of graunt of the reuerſion: for no graunt can bee made but to him that is partie to the deed, except it be by way of remainder. And therfore if a man make a lease for terme of life, and after the lesſor grant to a stranger that the tenant for terme of life shall haue the said to him and to his heires, that graunt is void if it bee made ouip of his meere motion without recōpence. And in likewise if a man make a Lease for terme of life, and after graunt the reuerſion to one for terme of life, the remainder ouer in fee, and the tenant atturneth to him that hath the estate for terme of life only, intending that he onely should haue aduantage of the graunt, his intent is void, & both shall take aduantage therof, and the attoznement shall be taken good, according to the graunt: And so in this case, though the feoffour intended that if the rent were not paid, that the stranger should enter, yet because the law giueth him no entry in that case, that intent is void, & the same stranger shall neither enter into the land by law nor conscience. Do. What shall then bee done with that land as thou thinkest after the condition broken: Sr. I think that the feoffor in this case may lawfully reenter, for when the feoffment was made vpon condition that the feoffee would pay a rent to a stranger, in those words is concluded in the Law, that if the rent were not paid to the stranger, that the feoffor should reenter: for those words vpon condition imply so much in the law though it bee not expressed.

And

The 21. Chapter.

And then when the feoffor went further & said that if the rent were not paid, that the stranger should enter, those words were void in law: and so the effect of the deed stood upon the first words whereby the feoffor may reenter in law & conscience: but if the first words had not bin conditional, I would haue holden it the greater doubt. D. I pray thee put the case thereof in certaine with such words as bee not conditionall that I may the better perceiue what thou meanest therein.

¶ The 19 question of the Student.

Cap. 21.

A Man maketh a Feoffement by deed indented, & by the same deed it is agreed, that the feoffee shall pay to A. B. & to his heirs a certaine rent yerely at certaine daies, & that if he pay not his rent, then it is agreed that A. B. or his heirs shall enter into the land, and after the feoffee payeth not the rent, then the question is, who ought in conscience to haue this land and rent. Do. Ere wee argue what conscience wil, let vs know first what the Law wil therein. S. I thinke that by the law neither the feoffor ne yet the said A. B. shall neuer enter into the land in this case for nonpayment of the rent, for there is no reentry in this case giuen to the feoffor for not payment of the rent as there is in the case next before, & the entry that is giuen to the said A. B. for not payment thereof is void in the law, because he is estrange to the

the deed, as it appeareth also in the next chapter befoze. And therefore me thinketh that the greatest doubt in this case is to see to what vse this feoffment shall be taken.

Do. There appeareth in this case as thou hast put it, not consideration ne recompence giuen to the feoffor, whereupon any vse may be deriued: and if the case be so indeed, and that the feoffour declared neuer his iud therin, to what vse shall it then be taken? Se. I thinke it shall be taken to be to the vse of the feoffee as long as he payeth the rent, for there is no reason why the feoffee should be busied with payment of the rent hauing nothing for his laboꝝ: ne it may not coueniently be taken that the intent of the feoffour was so, except hee expressed it, and then it must be take that hee intended to recōpēce the feoffe for the busines, that he should haue in the payment ouer. and by the words following his intent appeareth to be so, as mee thinketh, for if the rent were not paid, he would that D. S. should enter, and so it seemeth he intended not to haue any vse himselfe: and thus me seemeth this case should varie from the common case of vses, that is to say, if a man leised of land make a feoffment thereof, & it appeareth not to what vse the feoffment was made, ne it is not vpon any bargain or other recompence, then it shall be take to be to the vse of the feoffor, except the contrary can be proued by some bargain, or other like, or that his intent at the time of the luerie of seison was expressed that it should be to the vse of the feoffee or of some other, and then it shall

The 21. Chapter.

shal go according to his intent: but in this case me thinketh it shalbe take that his intēt was, that it should first be to the vse of the fessor, for the cause befoze rehearsed, except the contrary can be proued, & so that knowledge of the intēt of the fessor is the greatest certainty for knowledge of the vse in this case as me seemeth: but when the fessor goeth further and saith, that if the rent be not paid, that then the said A. B. should enter into the land, then it appeareth that his intent was that the rent should cease, and that A. B. should enter into the land, and though he may not by those words enter into the land after the rules of the law, and to haue frechold, yet those words seeme to be sufficient to proue that the intent of the fessor was that hee should haue the vse of the land: for sith hee had the rent to his owne vse, and not to the vse of the fessor, so it seemeth he shall haue the vse of the land that is assigned to him for the payment of the rent. Do. But I am somewhat in doubt whether he had the rent to his owne vse: for the intent of the fessor might bee that he should pay the rent for him to some other, or some other vse might bee appointed thereof by the fessor. S. If such an intent can be proued, then the intent must be obserued: but we bee in the case to wit, to what vse it shall bee taken if the intent of the fessor cannot be proued, and then me thinketh it cannot bee otherwise taken, but it shall bee to the vse of him to whom it should bee paid: for though it bee called a rent, yet it is no rent in law, ne in the law he shal neuer haue remedy for it, though it were

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were assigned to him, and to his heires without condition, neither by distresse, by assise, by writ of Annuity nor otherwise, but he shall be driven to sue in the Chauncerie for his remedie, and then when hee sueth in the Chauncerie, hee must surmise that he ought to haue it by conscience, and that he can haue no remedie for it in the law. And then, sith he hath no remedie to come to it but by the way of conscience, it seemeth it shal be take, that when he hath recovered it that he ought to haue it in conscience, & that to his owne vse, without the contrary can be proued, and if the contrary can be proued, and that the intent of the feoffor was, that hee should dispose it for him as hee should appoint, then hath he the rent in vse to another vse, and so one vse should be depending vpon another vse, which is seildome seen, and shall not be intended till it be proued: and so, sith no such matter is here expessed, we thinketh the rent shall be taken to be to the vse of him that it is paid to, and the land in likewise that is appointed to him for not painment of the said rent, shal bee also to his vse, how thinkest thou, will conscience serue therein? D. I thinke that as thou takest the law now, that conscience (in this case) and the Law be all one, for the law searcheth for same thing in this case, to know the case that conscience doth, that is to say, the intent of the feoffor, and therefore I would moue thee further in one thing. Sen. What is that?

D. That sith the intent of the feoffor shalbe so much regarded in this case: why it ought not also

The 22. Chapter.

to be as much regarded in the case that is in the last chapter next before this, where the words be conditional, & giue the feoffor a title to reenter: for me thinketh, that though the feffor may in that case reenter for the condition broken, that yet after this entry, he shal be seised of the land after his entry to the vse of him, to whom the land was assigned by the said Indenture for lacke of paiement of the rent, because the intent of the feoffor shal be taken to be so in that case aswell as in this. And I pray thee let me know thy mind, what diuersitie thou puttest betwene them. S. Thou driuest mee now to a narrow diuersitie, but yet I will answer thee therein as wel as I can. D. But first ere thou shew me that diuersitie, I pray thee shew mee how Uses began, and why so much land hath been put in vse in this Realme as hath bin. S. I will with godd will say as nice thinketh therein.

¶ How uses of land first began, and by what law, and the cause why so much land is put in Vse.

Cap. 22.

Vses were reserved by a secondary conclusion of the law of reason in this manner: where the general custom of property, whereby every man knew his own good from his neighbors was brought in among the people: It followed of reason the such lands & goods as a man had, ought not to be taken from him but by his assent

assent or by order of a law: & then sith it is so that every man that hath lands hath thereby 2 things in him, that is to say, the possession of the land which after the law of England is called the franktenement or the freehold, & the other is authoritie to take thereby the profits of the land: wherefoze it followeth that he that hath land & intendeth to give onely the possession & freehold thereof to another, & to keepe the profits to himself, ought in reason & conscience to have the profits, seeing there is no law made to prohibite, but that in conscience such reservation may be made. And so when a man maketh a feoffement to another and intendeth that he himselfe shal take the profits, then the lessee is said seised to his vse that is infeoffed him, & is to say, to the vse that he shall have the possession & freehold thereof as in the law, to the intent that the feffor shal take the profits: and vnder this maner, as I suppose, vases of land first began. C. It seemeth that the reserving of such vse is prohibited by the law, but if a man make a feoffement and reserve the profits, or any part of the profit, as the grasse, wood or such other, that reservation is void in the law: & mee thinketh it is all one to say, that the law iudgeth such a thing if it be done to bee void, & that the law prohibiteth that thing shall not be done. S. Truth it is that such reservation is void in the law as thou saist, and that is by reason of a Maxime in the Law that willet such reservation of part of the same thing shalbe iudged void in the law: but yet the law doth not prohibite that no such reservation shal be made.

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but if it be made it iudgeth of what effect it shal be, that is to say, that it shall be void, and so hee that maketh such reservation offendeth no law thereby, ne breaketh no law thereby, and therefore the reservation in conscience is good: but if it were prohibite by statut that no man should make such reservation, ne \S no feffemēt of trust should be made, but that al the feffemēt should be to the vse of him to whom possession of the land is given: then the reservation of such vles against the Statute should be void, because it were against the law, & yet such a Statut should not be a statute against reason, because such vles were first grounded and reserved by the law of reason, but it should preuent the law of reason, & should put away the cōsideration wherupon the law of reason was grounded before the statut made. And then to the other questiō, that is to say, why so much land hath been put in vse, it wilbe somewhat long & paraquenture to some tedious to shew al the causes particularly: but the very cause why the vse remained to the feffor notwithstanding his own feffemēt or fine, & sometime notwithstanding a recovery against him, is all vpon one consideration after the cause and entent of the gift, fine or recovery, as is aforesaid. D. Though reason may serue, that vpon a feffement a vse may be reserved to the feoffor by the intent of the feoffor against the forme of his gift, as thou hast said before, yet I maruel much how a vse may be reserved against a fine, that is one of \S highest Records that is in the law, and is taken in the Law of so high effect that it should make an
end

end of all strifes, or against a recovery that is ordeined in the law for them that bee wronged to recover their right by: and me thinketh that great inconuenience & hurt may follosw, when such Records may so lightly be auoided by a secret intent or vse of the parties, & by a slyde and bare auerrement & matter in deed, and specially sith such a matter in deed may be alleadged & is not true, wherby may rise great strife betwene the parties, & great confusion & vncertainty in the law: but neuerthelesse sith our intent is not at this time to treat of that matter, I pray thee touch shortly some of the causes, why there hath bin so many persons put in estate of lands to the vse of other, as there hath bin, for as I heare say, few men bee sole seised of their owne land. *St.* There hath been many causes thereof, of the which some bee put away by diuers statutes, & some remain yet: wherfore thou shalt vnderstand, that some haue put their land in feoffment secretly, to the intent & they that haue right to the land, should not know against whom to bring their action, and that is somewhat remedied by diuers statutes that giue actions against darrenors and takers of the profits. And sometime such feoffments of trust haue bin made to haue maintenace & bearing of their feoffees, which peraduelture were great Lords or rulers in the Countrey: and therefore to put away such maintenace, treble damages be giuen by statute against them that make such feoffments for maintenace. And sometime they were made to the vse of Mortmaine, which might then be made with-

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out forfeiture though it were prohibited that he
 should hold might not be given in Mortmain. But
 that is put away by the statute of R. 1. And
 sometime they were made to defraud the Lords
 of wards, reliefs, harriots, and of the lands of
 their villeins: but those points bee put away
 by diuers statutes made in the time of King H.
 the 7. Sometime they were made to avoid exe-
 cutions vpon Statute Staple, statute Mar-
 chant, & Recognizance: & remedie is provided
 for that, that a man shall haue execution of
 all such lāds as any person is seised of to the vse
 of him that is so bound, at the time of execution
 sued in the 19 yere of H. 7. And yet remaine se-
 olements, fines, and recoveries in vse of many
 other causes, in maner as many as there did
 before the said statute. And one cause why
 they be yet thus vled, is to put away tenancie
 by the curtesie, and titles of Dowder. Another
 cause is, for that lands in vse shal not be put in
 execution vpon a statute Staple, statute Mar-
 chant, nor Recognizance, but such as be in the
 hands of the Recognisor at the time of the exe-
 cution sued. And sometime lands be put in vse
 that they should not be put in execution vpon a
 writ of Extendi facias ad valentiam. And some-
 time such vles be made, that hee to whose vse
 he may bee, are his will thereon, & sometime for
 suertie of diuers covenants in Indentures of
 marriage, & other bargaines, & these 2 last arti-
 cles, be the chief & principal cause why so much
 land is put in vse. Also lāds in vse be not
 neither in a Foeme do nor in an action of Debe
 against the heire: ne they shall not be put in ex-
 ecution

cession by an Elegie sued vpon a reuerſie as ſome men ſay: & theſe be the very chiefe cauſes as I now remember, why ſo much land ſtandeth in uſe as there doth: & al the ſaid uſes bee referred by the intent of the parties vaderſtood or agreed between them, and that many times directly againſt the words of ſuch feoffment, ſine or recovery, and that is done by the law of reaſon, as is aforeſaid. D. May not a uſe bee aſſigned to a ſtraunger, as well as to bee referred to the feoffour, if the feoffour ſo appointed it vpon his feoffment? Ser. Yes as well, and in like wiſe to the feoffee, & that vpon a free gift without any bargain or recompence, if the feoffor ſo will. D. What if no feoffment be made but that a man grant to his ſelfe, that from henceforth he ſhall ſtand ſeiſed to his owne uſe, is not that uſe chaunged, though there bee no recompence? Ser. I thinke yes, for there was an uſe in life before the gift, which he may as lawfully give away as he might ſuch land if he had it in poſſeſſion. D. And what if a man being ſeiſed of land in fee, grant to another of his more motion without bargain or recompence, ſhall he from thenceforth ſhall bee ſeiſed to the uſe of the other, is not that graunt good? Ser. I ſuppoſe that it is not good, for as I take the law, a man cannot commence an uſe but by iury of ſeiſin or vpon a bargain or ſome other recompence. D. I hold me contented with that thou haſt ſaid in this Chapter for this time, & I pray thee ſhew me what diuerſity thou purteſt between thoſe two caſes that thou haſt before rehearſed in the 20. Chapter and in the 21. Chapter of this

The 23. Chapter.

present booke. S. I will with good will.

¶ The diuersitie betweene two cases hereafter following, whereof one is put in the 20. Chapter, and the other in the 21. Chapter of this present Booke.

Cap. 23.

The first case of þe said two cases is this, A man maketh a feoffment by deed indented bpō a condition þe feoffor shal pay certayne rent yerely to a stranger, &c. & if he pay it not, þe it shall be lawfull to the stranger to enter into the land. In this case I said before in the 20. Chapter, that the stranger might not enter, because that he was not primate vnto the condition. But I said, that in that case the feoffor might lawfully reenter by the first wordes of the Indenture, because they imply a condition in the law, & that the other wordes (that is to say) that the stranger should enter, be void in law & conscience. And therefore I said farther, that when the feoffor had reentered, that he was seised of the land to his owne vse, and not to the vse of the stranger, though his intent at the making of the feoffment, were that the stranger after his entry, should haue had the land to his owne vse, if he might haue entered by the law. And the cause why I thinke that the feoffor was seised in that case to his owne vse, I shall shew thee after ward. The second case is this, a man maketh a feoffment in fee, and it

is agreed vpon the feoffement, that the feoffee shall pay a yerely rent to a stranger, & if he pay it not, that then the stranger shall enter into the lād. In this case I said as it appeareth in the said xxj. Chapter, that if the feoffee payed not the rent : that the stranger should haue the vse of the land, though he may not by the rules of the law enter into the land, and the diuersitie betwene the cases me thinketh to be this. In the first case it appeareth as I haue said before in the said xx. Chapter, that the feoffour might lawfully reenter by the law for not payment of rent, & then when he entered according, he by that entry auoided the first liuery of seysin, in somuch that after the reentry hee was seised of the land of like estate as hee was before the feoffement : And so remaineth nothing, whereupon the stranger might ground his vse, but onely the bare graunt or intent of the feoffor, when he gaue the land to the feoffee vpon condition that hee should pay the rent to the straunger, and if not, that it should be lawfull to the stranger to enter : for the feoffement is auoided by the reentry of the feffor as I haue said before : and as I said in the last Chapter, as I suppose a nude or bare graunt of him that is seised of land, is not sufficient to begin an vse vpo. D. A bare graunt may chāge an vse as thou thy selfe agreed in the last chapter, why then may not an vse as well begin vpo a bare graunt. S. when an vse is in esse, hee that hath the vse may of his mere motion giue it away if he will without recompence, as he might the land if he had it in possession,

¶ An.

but

The 23. Chapter.

but I take it for a ground, that he can not so begin an vse without a livery of seisin, or upon a recompence or bargain, & that there is such a ground in the law, & it may not so begin it appeareth thus: It hath bin alway holden for law, that if a man make a deed of feoffment to another & deliver the deed to him as his deed, that in this case he to whom the deed is delivered, hath no title ne meddling with the land afore livery of seisin be made to him, but only that he may enter & occupy the land at the will of the feoffor, & there is no booke saith that the feoffee in that case is seised thereof before livery to the vse of the feoffee. And in likewise if a man make a deed of feoffment of 2 acres of land that lie in 2 shires, intending to give them to the feoffee & maketh livery of seisin in the one shire, & not in the other, in this case it is commonly holden in books that & deed is void to the acre where no livery is made, except it lie within & view, save only that he may enter & occupy at will, as is aforesaid: & there is no booke that saith that the feoffee should have the vse of the other acre, for if an vse passed thereby, then were not the deed void unto all intents, & yet it appeareth by the words of the deed that the feoffor gave & lands to the feoffee, but for lacke of livery of seisin & gift was void, & so me thinketh it is here, wout livery of seisin be made according. But in & second case of i said 2. cases the feoffee may not re-enter for non payment of the rent, and so the first livery of seisin continueth and standeth in effect, and thereupon the first vse may well begin and take effect in the stranger of the land when

When the rent is not paid vnto him according to the first agreement. And so me thinketh that in the first case the vse is determined, because the liuery of seisin, wherupon it commenced is determined, & that in the second case the vse of the land taketh effect in the stranger for not paymēt of p rent, by the grant made at the first liuery, which yet continueth in his effect, & this me thinketh is the diuersitie betwene the cases. D. Yet notwithstanding the reason that thou hast made, me think that if a man seised of lands, make a gift thereof by a nude promise, without any liuery of seisin or recompēce to him made, and grant that he shall be seised to his vse, that though the promise be void in the law, that yet neuerthelesse it must hold and stand good in conscience and by the law of reason: for one rule of the law of reason is, that we may do nothing against the truth, and sith the truth is that the owner of the ground hath granted that he shall be seised to the vse of the other, that grant must needs stand in effect, or else there is no truth in the grauntoz. S. It is not against the truth of the grauntoz in this case, though by the graunt he bee not seised to to vse of the other, but it proueth that he hath granted, that the law will not warrant him to graunt, wherefoze his graunt is void. But if the grauntoz had gone farther and said, that he would also suffer the other to take the profits of the lands without let or other interruption, or that hee would make him estate in the land when he should bee required, then I think in those cases he were bound in conscience,
by

· The 24. Chapter.

by that rule of the law of reason that thou hast remembred, to perform them, if he intend to be bounden by his promise, or els he should go against his owne truth, and against his owne promise. But yet it shall make no vse in that case, nor he to whom the promise is made shall haue no action in the Law vpon that promise, though it be not performed, for it is called in the law a Nude or naked promise. And thus me thinkech, that in the first case of the said two cases, the grant is now auoided in the law by the reentry of the feoffor, and that the feoffor is not bounden by his grant neither in law nor conscience, but in the second case he is bound, so that the vse passeth fro him, as I haue said befoze. D. I hold me content with thy conceit for this time, but I pray thee shew mee somewhat more at large what is taken for a Nude contract, or a naked promise in the Lawes of England, and where an action may lye therevpon, and where not. St. I will with good will say as me thinketh therein.

¶ What is a Nude contract, or naked promise after the lawes of England, and whether any action may lye therupon.

Cap. 24.

First it is to be vnderstood, that contracts be grounded vpon a custom of the realm, & by the law that is called *Ius gentium*, & not directly by the law of reason, for when all things were in common, it needed not to haue contracts,

tracts, but after property was brought in, they were right expedient to all people, so that a man might haue of his neighbor that he had not of his owne, and that could not bee lawfully but by his gift, by way of lending, concord, or by some lease, bargain, or sale: and such bargaines and sales be called contracts, and bee made by assent of the parties vpon agreement between them, of goods or lands, for money, or for other recompence, but of money vsual, for money vsual is no contract. Also a concord is properly vpon an agreement betwene the parties, with diuers articles therein, some rising on one part, and some on the other, As if J. at Shile letteth a Chamber to Henry Hart, and it is farther agreed betwene them, that the said H. Hart shall go to boord with the said John at Shile, and the said Henry Hart to pay for the Chamber and boording a certaine summe &c. this is properly called a Concord, but it is also a contract, & a good action lyeth vpon it. Howbeit it is not much argued in the Lawes of England what diuersitie is betwene a contract, a concord, a promise, a gift, a lone, or a pledge, a bargain, a couenant, or such other. For the intent of the law is to haue the effect of the matter argued and not the termes. And a nude contract is, where a man maketh a bargain, or a sale of his goods or lands, without any recompence appointed for it: As if I say to another, I sell thee all my land, or all my goods, and nothing is assigned that the other shall giue or pay for it, this is a Nude contract, and as I take it, it is void in the law and conscience: and a Nude

The 24. Chapter.

or naked promise is, where a mā promiset̄h an other to giue him certaine money such a day, or to build an house, or to do him such certain seruice, & nothing is assigned for the money, for building, nor for the seruice: these be called naked promises, because there is nothing assigned why they should be made, and I thinke no action lyeth in those cases though they bee not performed. Also if I promise to ano her to keepe him such certaine goods safely to such a time, & after I refuse to take them, there lyeth no action against me for it: But if I take the and after they be lost or impaired through my negligent keeping, there an actiō lyeth. D. But what opinion hold they that bee learned in the law of Englād in such promises that be called naked or rude promises: whether do they hold that they that make the promise, be bounden in cōscience to perform their promise, though they cannot be compelled thereto by the law, or not? S. The books of the Law of England entreat little therof, for it is left to the determination of Doctors, & therefore I pray the shew me somewhat now of thy mind therein, & the I shall shew the therein somewhat of the minds of diuers, that be learned in the law of the Realm. D. To declare the matter plainly after the saying of Doctors, it would aske a long tyme, and therefore I wil touch it briefly, to giue thee occasion to desire to heare moze therein hereafter. First thou shalt vnderstād that there is a promise that is called an Aduow, & that is a promise made to God, & hee that doth make such a vow vpon a deliberate mind intending to per-
forme

for me it, is bound in conscience to do it, though it be only made in the heart without pronouncing of words, and of other promises made to man vpon a certain consideration, if the promise be not against the law: as if I promise to giue **W r.** because he hath made him such a house or hath lent him such a thing, or such other like, I thinke him bound to keepe his promise. But if his promise be so naked, that there is no manner of consideration why it should be made, then I thinke him not bound to performe it, for it is to suppose that there was some error in the making of the promise: but if such a promise be made to an Vniuersity, to a city, to the church, to the Clergy, or to poore men of such a place, & to the honor of God or such other cause like, as for maintenance of learning, of the common wealth, of the seruice of God, or in reliefe of pouertie or such other, then I thinke that he is bound in conscience to performe it, though there be no consideration of worldly profit, that the grantor hath had or intendeth to haue for it: and in all such promises it must be vnderstood that he that made the promise intended to be bound by his promise, for else commonly after all Doctors hee is not bound, vntil hee were bound to it before his promise: As if a man promise to giue his father a gowne that hath need of it, to keepe him from cold, and yet thinketh not to giue it him, neuertheless he is bound to giue it, for he was bound thereto before. And after some Doctors a man may be excused of such a promise in conscience by casualtie that cometh after the promise, if it be so, that if hee had

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had knowne of the casualtie at the making of the promise hee would not haue made it. And also such promises if they shall bind, they must be honest, lawfull, and possible, and els they are not to be holden in conscience, though there be a cause &c. And if the promise bee good & with a cause, though no worldly profit shall grow thereby to him that maketh the promise, but onely a spiritual profit, as in the case before rehearsed of a promise made to an Vniuersity, to a City, to the Church, or such other, & with a cause as to the honour of God, there is most commonly holden that an actio vpo those promises lyeth in the Law Cannon. S. Whether doest thou meane in such promises made to an Vniuersitie, to a citie, or to such other as thou hast rehearsed before, & with a cause, as to the honor of God or such other, that the partie shalbe bound by his promise, if he intended not to be bounden thereby, ye or nay? D. I thinke nay, no more than vpon promises made vnto common persons. Sen. And then mee thinketh cleerely, that no action can lie against him vpo such promises, for it is secret in his owne conscience, whether he intended for to be bound or nay. And of the intent inward in h hart, mans law cannot iudge, and that is one of the causes why the Law of God is necessarie (that is to say) to iudge inward things, and if an action should lie in h case in h law Canon, the should the law Cannon iudge vpo h inward intent of the heart, which cannot be as me seemeth. And therfore after diuers h be learned in the lawes of the realme, all promises shal be taken in this

maner

maner, that is to say, If he to whom the promise is made, haue a charge by reason of the promise which he hath also performed: the in d case he shall haue an action for that thing that was promised, though he that made the promise haue no worldly profit by it. As if a man *Roll.* say to another, heale such a poore man of his *593* disease, or make an higg way, and I shall giue thee this much, and if he do it, I thinke an action lyeth at the common law. And mozeouer though the thing that he shall do be all spirituall, yet if he performe it, I thinke an action lyeth at the common Law. As if a man say to another, fast for me all the next Lent, and I shall giue thee xx. pounds, and he performeth it, I thinke an action lyeth at the Common Law. And in likewise if a man say to another, marry my daughter and I will giue thee xx. pounds, vpon this promise an action lyeth, if he marry his daughter: and in this case hee cannot discharge the promise though he thought not to be bound thereby, for it is a good contract, & he may haue Quid pro quo, that is to say, the preferment of his daughter for his money. But in those promises made to an Vniuersitie, or such other as thou hast remembred before, with such causes as thou hast shewed, that is to say, to the honour of God, or to the increase of learning, or such other like, where the partie to whom the promise was made is bound to no new charge, by reason of the promise made to him, but as hee was bound to befoze, there they thinke that no action lyeth against him, though hee performe not his

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his promise, for it is no contract, & so his own conscience must be his iudge whether he intended to be bound by his promise or not. And if he intended it not: then he offended for his dissimulation only, but if he intended to be bound, then if he perform it not, vnto truth is in him, and he proueth himselfe to be a lyer, which is prohibited as wel by the law of God, as by the law of reason: And further more, many & be learned in the Law of England hold, that a man is as much bounden in conscience by a promise made to a common person, if he intended to be bound by his promise, as he is in the other cases that thou hast remembred of a promise made to the Church, or the Clergie, or such other: for they say that asmuch vnto truth is in the breaking of the one as of the other, & they say that the vnto truth is no more to be pondered than the person to whom & promises be made. D. But what hold they if the promise be made for a thing past, as I promise thee xl. l. for that thou hast builded me such a house, yeth an action there? S. They suppose nay, but he shal be bound in conscience to perform it after his intent, as is before said. D. And if a man promise to giue another xl. li. in recompence for such a trespass that he hath done him, yeth an action there? S. I suppose nay, & the cause is for that such promises be no perfect contracts: for a contract is properly where a man for his money shal haue by assent of the other partie certain goods or some other profit at the time of & contract or after: but if & thing be promised for a cause & is past by way of a recompence, then it is rather an accord than a con-

contract, but then the Law is, that vpon such accord the thing that is promised in recompence must be paid, or deliuered in hand, for vpon an accord there lyeth no action D. But in the case of trespassse, whether hold they that he be bound by his promise, though he intended not to be bound thereby: S. They think nay, no more than in the other cases that be put before. D. In the other cases he was not bound to that he promised, but onely by his promise, but in this case of trespass, he was bound in conscience before the promise to make recompence for the trespassse: and therfore it seemeth, that he is bound in conscience to keepe his promise, though he intended not to be bound thereby.

Sr. Though he were bound before the promise to make recompence for his trespass, yet hee was not bound to no summe in certain but by his promise: and because that the summe may be too much, or too little, and not egall to the trespass, and that the partie to whom the trespass was done notwithstanding the promise is at liberty to take his action of Trespass if hee will, therefore they hold that hee may be his owne Judge in conscience, whether hee intended to be bound by his promise or not, as hee may in other cases, but if it were of a debt, then they hold that he is bound to performe his promise in conscience. D. What if in the case of Trespassse hee affirmeth his promise with an oath. S. Then they hold that hee is bound to performe it for sauing of his oath, though hee intended not to be bound, but if hee intended to be bound by his promise, then they say, that

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an oath needeth not but to enforce þ promise, for they say, he breaketh the Law of reason, which is, that we may do nothing against the truth, as wel whē he breaketh his promise that he thought in his own hart to be bound by, as he doth when he breaketh his oath, though the offence be not so great by reason of the periu-
rie. Moreover to that thou saiest that vpon such promises as thou hast rehearsed before, shal lye an action after the law Cannon, verily as to that in this realme there can no action ly thereon in the spirituall court, if the promise be of a temporall thing: for a prohibitiō, or a Præmunire facias should ly in that case. D. That is marueil sith there can no action lie thereon in the Kings court, as thou saist thy self. S. That maketh no matter, for though there lye no action in the Kings court, against executors vpon a simple contract, yet if they bee sued in that case for the debt in the Spirituall court, a prohibition lyeth. And in likewise if a man wage his Law vntuly in an action of debt vpon a contract in the Kings Court, yet he shall not be sued for the periury in the Spiritual court, and yet no remedy lyeth for the periurie in the Kings Court: for the prohibition lyeth not onely, where a man is sued in the Spirituall Court of such things, as the party may haue his remedie in the kings court, but also where the Spiritual court holdeth plæ in such case, where they by the Kings prerogative, and by the auncient custome of the realme ought none to hold. Doct. I will take aduisement vpon that thou hast said in this matter, til another time;

time, and I pray thee now proceed to another question.

¶ The 20. question of the Student.

Cap. 25.

A Man hath two sons, one borne before espousels, & the other after espousels. & the father by his will bequetheth to his son & heire all his goods, which of these two sons shall haue the goods in conscience? D. As I said in our first dialogue in latin, the last Chap. the doubt of this case dependeth not in the knowing what conscience will in this case, but rather the knowing which of the sons shall be iudged heire (that is to say) whether he shall be taken for heire that is heire by the Spirituall Law, or hee that is heire by the Law of the Realme, or else that it shall be iudged for him that the father took for heire? S. As to that point, admit the Fathers mind not to be known, or els that his mind was & he should be taken for heir, that should be iudged for heir by the law, that in this case it ought to be iudged by. And then I pray thee shew me thy mind therein, for though the question be not directly depending vpon the point to see what conscience will in this case, yet it is right expedient for the well ordering of conscience, that it be known after what law it shall be iudged: for if it ought to be iudged after the temporal law who should be heire, the it were against conscience, if the iudges in the spirituall law should

D. n.

Iudge

The 27. Chapter.

Judge him for heire that is heire by the spiritual Law, and I thinke they should be bound to restitution thereby, and therefore I pray the see me thine opinion, after what Law it shall be iudged. D. We thinke that in this case it shall be iudged after the law of p church, for it appeareth that the bequest is of goods, and therefore if any suit shall be taken vpon the execution of the will for the bequest, it must be taken in the Spirituall Court, and when it is depending in the spiritual court, we thinke it must be iudged after the spirituall law: for of the Temporal law they haue no knowledge, nor they are not bound to know it as we thinke, and more stronger not to Judge after it. But if the bequest had bin of a chattell real, as of a lease for terme of yeares, or of a Ward, or such other, then the matter should haue com. in debate in the Kings Court, and then I thinke the Judges there should iudge after the Law of the Realme, and that is, that the younger brother is heire: and so we thinke the diuersity of the Courts shall make the diuersitie of iudgement. 8. Of that might follow a great incōueniēce as we sawe, for it might be such a case that both cha. tels real and cha. tels personal were in the will, & the after thine opinion, the one son should haue the chattels personal, and the other son the chattels real, and it cannot be conveniently taken as we thinke, but that the fathers will was, that the one son should haue all, and not bee diuided. Therefore we thinke that he shall be iudged for heire that is heire by the common law:
and

and that the iudges spirituall in this case bee bound to take notice what the common law is, for sith the things that be in variance bee temporal, that is to say, the goods of the father, it is reason that the right of them in this realme shall be determined by the law of the Realme. D. How may that be: for the Judges spirituall know not the law of the Realme, ne they cannot know it as to the most part of it, for much part of the law is in such speech that few men haue knowledge of it, & there is no means ne familiarity of studie between them that learne the said Law: for they be learned in severall places & after diuers waies, and after diuers manners of teachings, and in diuers speeches, and commonly the one of them haue none of the booke of the other, and so bind the spirituall Judges to giue Iudgement after the law that they know not, ne that they cannot come to the knowledge of it, seemeth not reasonable. Sen. They must doe therein as the Kings Judges must doe, when any matter cometh before them that ought to be iudged after the spirituall Law, whereof I put diuers cases in our first Dialogue in English the vii. Chapter, that is to say, they must either take knowledge of it by their own study or els they must enquire of them that be learned in the law of the Church, what the law is, and in that wise must they do. But it is to doubt, that some of them would be loath to aske any such question in such case, or to confesse that they are bound to giue their iudgement after the temporal Law, and surely they may lightly offend their conscience.

The 25. Chapter.

D. I suppose that some be of opinion that they are not bound to know the law of the realme, & verily to my remembrance I have not heard that Judges of the spirituall law are bound to know the law of the realme.

S. And I suppose that they are not onely bound to know the law of the Realme, or to do that in them is to know it, when the knowledge of it openeth the right of the matter that dependeth before them, but that they bee also bound to know where and in what case they ought to Judge after it: for in such cases they must take the Kings law as the Law spiritual to that point, & are bound in conscience to follow it as it may appeare by diuers cases, whereof one is this. Two Iointenants be of goods, and the one of them by his last will bequeatheth all his part to a straunger and maketh the other Iointenant his executor & directh, if he to whom the bequest is made, sue the other iointenant, vpon the legacy as executor &c. vpon this matter shewed, the Judges of the spirituall law are bound to iudge the will to be void, because it is void by the Law of the realme, whereby the iointenant hath right to the whole goods by the title of the Survivor, and is Iudged to haue the goods as by the first gift which is before the title of the will, and must therefore haue preferment as the eldest tytle, and if the Judges of the spiritual Court iudge otherwise, they are bound to restitution: and by like reason the Executors of a man that is Outlawed at the time of his death may discharge themselves in the
Spi

Spiritual court of the performing of legacies, because they be chargeable to the king, and yet there is no such law of vttagary in the Spirituall law.

D. By occasion of that thou hast said before I would aske of thee this question. If a Parson of a Church alien a portion of Dismes according as the Spirituall law hath ordained, is not that alienation sufficient, though it haue not the solemnities of the Tempozall Law? St. I am in doubt therein if the portion bee vnder the fourth part of the value of the Church: but if it be to the value of the fourth part of the Church, or aboue, it is not sufficient, and therefore was the writ of right of dismes ordained: and if in a writ of right of Dismes it bee iudged in the Kings Court for the patron of the successor of him that alieneth, because the alienation was not made according to the common law, then the Judges of the Spirituall law are bound to giue their iudgment according to the iudgement giuen in the Kings Court. And in likewise if a parson of a Church agree to take a pension for the tythe of a Mill, if the pension bee to the fourth part of the value of the Church or aboue, then it must be aliened after the solemnities of the Kings Laws, as lands and tenements must, or else the patron of the successor of him that alieneth, may haue a writ of right of Dismes, and recouer in the Kings court, & then the Judges of the Spiritual court are bound to giue iudgement in the Spiritual Courts accordingly, as is aforesayd. Doct. I haue heard say, that a writ of right of dismes is
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 giuen

The 25. Chapter.

giuen by the statute of West. 2. and that speaketh only of oumes, & not of pensions. So where a Parson of a Church is wrongfully deforced of his oumes, and is let by an Indicavit to aske his oumes in the Spiritual Court, then the parron may haue a writ of Right of oumes by the statute that thou speakest of, for there lay none at the common Law, for the Parson had there good right, though he were let by the Indicavit to sue for his right. But where the Parson had no remedy at the Spiritual law, there a writ of Right of oumes lay for the Patron by the common law, aswel of pensions as of oumes, and some say that in such case it lay of lesse than of the fourth part by the common law, but that I passe ouer. And the reason why it lay at the common Law, if the oumes or pensions were aboue the fourth part &c. was this: by the spirituall law the alienation of the parson with the assent of the Bishop and of the Chapter shall barre the successour without assent of the patron, and so the patron might lose his patronage and be not assenting thereto: for his encumbent might haue no remedy but in the Spiritual court, and there hee was barred, wherefore the parron in that case shall haue his remedy by the common law where the assent of the Bishop and Chapter without the Patron shall not serue, as it is said before. But where the encumbent had good right by the Spirituall Law, there lay no remedy for the Patron by the Common Law, though the incumbent were let by an Indicavit, & for that cause was the said Statute made, and it lyeth

lyeth aswel by the equity for offrings and pen-
 sions, as for Dilines. Then further I would
 thinke that where the Spirituall Court may
 hold place of a temporall thing, that they must
 iudge after the temporall Law, and that ig-
 norance shall not excuse them in that case: for
 by taking of their office they haue bound them-
 selues to haue knowledge of asmuch as belon-
 geth to their office, as all Iudges be, spiritual,
 or temporall. But if it were in Argument in
 this case, whether the eldest sonne might bee a
 Priest because he is a bastard in the temporall
 Law, that should be iudged after the spirituall
 Law, for the matter is spirituall. Do. Yet not-
 withstanding all the reasons that thou hast
 made, I cannot see how the Iudges of the spi-
 rituall Law, shall be compelled to take notice
 of the temporall Law, saying that the most part
 of it is in the French tongue, for it were hard
 that euery Spirituall Iudge should be com-
 pelled to learne the tongue. But if the law of
 the Realme were set in such order that they
 that intended to studie the Law Canon, might
 first haue a sight of the law of the Realme, as
 they haue now of the Law Ciuill, and that
 some booke and treatise were made of cases
 of conscience concerning these two Lawes, as
 there be now concerning the law Ciuill & the
 law Canon, I would assent that it were right
 expedient, and then reason might serue the bet-
 ter, that they should be compelled to take notice
 of the Law of the Realme, as they bee now
 bound in such Countries as the law Ciuill is
 vsed to take notice of that Law.

The 26. Chapter.

S. *Ma* thinketh thine opinion is right good and reasonable, but till such an order be taken, they are bound, as I suppose, to inquire of the that be learned in the common Law, what the Law is, and so to giue their iudgement according, if they will keep themselves from offence of conscience. And forasmuch as thou hast wel satisfied my mind in all these questions before, I pray thee now that I may somewhat seele thy mind in diuers articles that bee written in diuers booke for the ordering of conscience vpon the Law Cannon and Ciuill: for mee thinketh, that there bee diuers conclusions put in diuers booke, as in the *Summes* called *summa Angelica*, and *summa Rosella*, & diuers other, for the good order of conscience, that bee against the law of this realme, and rather blind conscience, than do giue any light vnto it.

D. I pray thee shew me some of those cases.
S. I will with good will.

¶ Whether an Abbot may with conscience present to an Aduowson of a church that belongeth to the house without assent of the Couent.

Cap. 26.

It appeareth in the Chapter, *Et agnoscitur de his quæ sunt a Prælati*, the which Chapter is recited in the sum called *summa Angelica*, in the title *Abbas*, the *xxij.* article, that he may not without any custom, or any special

priuiledge to helpe therein. **S**c. **T**ruth it is, that
 there is such a decretall, but they that be lear-
 ned in the law of England, hold the decretall
 bindeth not in this Realme, & this is the cause
 why they do hold that opinion: **B**y the Law
 of the realm the whole disposition of the lands
 and goods of the Abbey is y^e Abbots onely for
 the tunc that he is Abbot, and not in the Co-
 uent: for they bee but as dead persons in the
 Law, and therefore the Abbot shall sue and be
 sued only without the Couent, doe homage,
 fealtie, atturue, make leases, and present to ad-
 uowsons only in his owne name, and they
 say further that this authoritie cannot bee ta-
 ken from him, but by the Law of the realme,
 and so they say, that the makers of the decre-
 tall exceded their power: wherfore they say it
 is not to bee holden in conscience, no more than
 if a decree were made that a lease for terme of
 yeres or at will made by the Abbot without
 the couent should be immediately void, & so they
 thinke that the Abbot may in this case present
 in his own name without offence of conscience,
 because the said decretall holdeth not in this
 Realme. **D**o. **B**ut many be of opinion, that no
 man hath authoritie to present in right and
 conscience to any benefice with Cure but the
 Pope, or that hee hath his authoritie therein
 deriued from the Pope: for they say that foras-
 much as the Pope is the Vicar generall vnder
 God, and hath the charge of the soules of al
 people that be in the flock of Christs Church,
 it is reason that sith hee cannot minister to all,
 he do that is necessarie to all people for their
 soules

The 26. Chapter.

Soules health in his owne person, that hee shal
 assigne deputies for his discharge in that be-
 halfe. And because Patrons claime to present
 to Churches in this Realme by their owne
 right, without tittle deriued from the Pope,
 they say that they blurpe vpon the Popes au-
 thoritie: therefore they conclude that though
 the Abbot haue tittle by the law of the Realme
 to present in this case in his owne name, that
 yet because that tittle is against the Popes
 prerogative, that that tittle, ne yet the Law of
 the Realme th^e maintaineth that tittle, hol-
 deth not in conscience. And they say also that
 it belongeth to the law Cannon to determine
 the right of presentment to benefices, for it is a
 thing spirituall and belongeth to the spirituall
 iurisdiction, as the deprivation from a benefice
 doth, and so they say the said decretall bindeth
 in conscience, though in the law of the Realme
 it bindeth not. S. As to the first consideration
 I would right well agree, that if the patrons
 of Churches in this Realme claimed to put
 incumbents into such Churches as should fol-
 low of their Patronage without presenting
 them to the bishop, or if they claimed that the
 Bishop should admit such incumbent as they
 should present without any examination to be
 made of his abilitie in that behalfe, that that
 claime were against reason and conscience, for
 the cause that thou hast rehearsed: But foras-
 much as the Patrons in this Realme claime
 no more but to present their Incumbents to
 the Bishop, and then the Bishop to examine
 the ability of the incumbent, and if he find him
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by the Examination not able to haue cure of
 soules, he then to refuse him, and the patron to
 present another that shalbe able, and if he be a-
 ble, then the Bishop to aduint him, institute
 him, & induct him. I thinke that this claime, &
 their presentments therupon stand with good
 reason and conscience. And as to the second
 consideration, it is holden in the Lawes of the
 Realme, that the right of presentment to a
 Church, is a tempozall inheritance, & shall dis-
 cend by course of inheritance from heire to heire
 as lands & tenements shal, & shalbe take as an
 assets as lands and tenements be: and for the
 triall of the right of patronages be ordeined in
 the law diuers actions for them & be wronged
 in that behalf, as writs of right of Aduowson,
 Assises of Darrein presentment, Quare impe-
 dit, & diuers other which alway without time
 of mind haue bin pleaded in the Kings courts,
 as things pertaining to his Crowne and roya-
 ll dignity: and therof. *Je say* that in this
 case his lawes ought to be obeyed in law and
 conscience. D. If it come in variance whether
 hee that is so presented be able or not able, by
 whom shall the abilitie be tried? If the ordi-
 nary be not party to the action, it shall be try-
 ed by the Ordinarie, and if he be partie it shall
 be tryed by the Metropolitane. D. Then the
 Law is more reasonable in that point than I
 thought it had been: but in the other point I
 will take aduise in it til another time, and
 I pray the shew me thy mind in this point:
 If an Abbot name his couent with him in his
 presentation, both that make the presentation
 both

The 26. Chapter.

void in the law, or is the presentation good that notwithstanding?

Seu. I think it is not void therefore, but the naming of them is void, and a thing more than needeth. For if the Abbot be disturbed, he must bring his action in his own name without the couent. D. Then I perceiue well that it is not prohibited by the law of England, but that the Abbot may name the couent in his presentation with him, and also take their assent whom he shall present if he will: and then I hold it the surest way, that hee so doe, for in so doing he shall not offend neither in Law, nor conscience. S. To take the assent of the couent whom he shall present, and to name them also in the presentation, knowing that he may doe otherwise, both in Law and Conscience if hee will, is no offence: but if he take their assent, or name the with him in the presentation, thinking that he is so bound to doe in law & conscience, setting a conscience where none is, & regarding not the law of the Realme, that will discharge his conscience in this behalfe, if hee will, so that he present an able man as he may do without their assent, there is an error, and offence of conscience in the Abbot. And in likewise if the Abbot present in his owne name, and therefore the Couent saith that hee offendeth in conscience, in that he obserueth not the law of the Church, for that he taketh not their assent, then they offend in iudging him to offend that offendeth not. And therefore the sure way is in this case to iudge both the said laws of such effect as they be, & not to set an offence of

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of conscience by breaking of the said decre^e,
which standeth not in effect in this behalf within
this Realme.

- ¶ If a mā find beasts in his ground doing hurt,
whether may hee by his owne authoritie,
take them & keep them till he bee
satisfied for the hurt.

Cap. 27.

This question is made in the Sum called
Summa Rosella, in the title of restitution,
that is to say, Restitutio 13. the 9. Arti-
cle, & there it is answered, that he may not take
them for to hold them as a pledge till he bee sa-
tisfied for the hurt: but that hee may take them
and keepe them till he know who oweth them,
that he may thereby learne against whome to
haue his remedie. It is not the law of the realme
so in likewise. No verily, for by the Law of
the Realme hee that in that case hath the hurt,
may take the beasts as a Distres, & put them
in a pound Duert, so it bee within the same
Shire, and there let them remain till the owner
will make him amends for the hurt. D. What
callest thou a pound Duert. An. A pound Du-
uert is not onely such a pound as is common-
ly made in Towns and Lordships, for to put
in beasts that bee distrained, but it is also eu-
ery place where they may bee lawfully, not
making the owner an offendour for their bee-
ing there: And that it be there also, that the
owner

The 27. Chapter.

owner may lawfully giue the beasts meat and drinke while they be in pound.

D. And if they die in pound for lack of meat whose iopardy is it? S. If it be such a pound Quert as I speake of, it is at the perill of him that oweth the beasts, so that he that had the hurt shalbe at liberty to take his action for the trespassse if he will: and if it bee not a lawfull pound, then it is at the perill of him that distrained, and so it is if he drine them out of the shire and they die there.

D. I put case that he that oweth the beasts, offer sufficient amends, and the other will not take it, but keepeth the beasts still in pound, may not the owner take them out? S. No, for he may not be his owne iudge, and if he do, an action lyeth against him for breaking of the pound: but he must sue a Repleuin to haue his beasts deliuered him out of the pound, and thereupon it shalbe tried by xij. men, whether the amends that was offered were sufficient or not, and if it be found that the offer was not sufficient, then he that hath the hurt shall haue such amends as the xij. men shall assesse. D. If it bee found by the xij. men, that the amends were sufficient, shall he that refuseth to take it, haue no punishment for his refusall, and for keeping of the beasts in pound after that time? S. I thinke no, but that he shall pay damages in the Repleuin, because the issue is tried against him.

D. I put case that the beasts after the refusall dye in pound for lack of meat, at whose iopardy is it then? S. At the iopardy of him that oweth

owed the beasts, as it was before : for hee is bound at his peril by reason of the wrong that was done at the beginning, to see that they haue meat as long as they shalbe in possid, vnlesse the Kings w^{ill} it come to deliuer them, & he resisteth it : for after that time it will be at his icopardy if they die for lacke of meat, & the damages shall be recovered in an action brought vpon the Statute for disobeying the Kings w^{ill}.

¶ Whether a gift made by one vnder the age of xxv. yeares be good.

Cap. 28.

It appeareth in Summa Angelica in the title donatio prima the 7. article, that a mā before the age of 25. yeres may not giue, without it be with the authoritie of his tutor : Is it not so likewise at the common Law? S. The age of infants to giue, or sel their lands and goods in the law of England is at 21. yere; or aboue, so that after that age the gift is good, & before that age it is not good, by whose assent soeuer it be, except it be for his meat, & his drink, or apparel, or that he doe it as executor, in performance of the will of his testator, or in some other like cases, that needeth not to be rehearsed here: & that age must be obserued in this realm in law & conscience, & not the said age of 25. yere. D. I put case, it were ordeined by a decree of the Church, that if any mā by his will bequeathed goods to another, and willett they

Id. Shall

The 28. Chapter,

shalbe deliuered to him at his full age, & that in that case 25. yerres shalbe taken for the full age, shall not that decreē be obserued & stand owd after the law of England: S. I suppose it shall not, for though it belong to the church to haue the probate and the execution of Testaments made of goods & chattels, except it be in certain Lordships & seignories that haue the by prescription: yet the church may not as it seemeth determine what shalbe the lawfull age for any person to haue the goods, for that belongeth to the king & his lawes to determine: & therfore if it were ordained by a Statut of the realme, & he should not in such a case haue the goods till he were of the age of 25. yers, that Statut were good & to be obserued aswel in the spiritual law as in the law of the Realme, & if a Statut were good in that case, then a decreē made therof is not to be obserued, for the ordyng of h age may not be vnder two seuerall powers, and one property of euery good law of man is, that the maker exceed not his authority: and I think that the spiritual iudge in that case ought to iudge the full age after the law of the Realme, seeing that the matter of the age concerneth temporal goods: and I suppose farther that as the king by authority of his Parliament may ordaine that all wils shalbe void, & that the goods of euery man shalbe disposed, in such maner as by Statut should be assigned, that more stronger he may appoint at what age such wils as he made shalbe performed. D. Thinkest thou then that the King may take away the power of the Ordinary, that he shal not call executors to account,

compt: S. I am somewhat in doubt therein, but it seemeth that if it might be enacted by Statute, that all Wils should be void, as is aforesaid, & then it might bee enacted, that no man should haue authoritie, to call none to accompt vpon such Wils, but such as the Statute shall therein appoint, for he & may do the more, may doe the lesse: notwithstanding I will nothing speake determinatly in that point at this time; ne I meane not, that it were good to make a Statute that all Wils should be void, for I thinke them right expedient, but mine intent is, to proue & the common law may ordaine the time of the full age, aswel in Wils of temporall things as otherwise, and also that Wils shalbe made. And if it may so do, then much stronger it belongeth to the Kings lawes to interpret Wils concerning temporall things, aswel when they come in argument before his Judges, as when they come in argument before spirituall Judges, & that they ought not to bee iudged by seuerall lawes (that is to say) by the spirituall Judges in one manner, & by the Kings Judges in another manner.

¶ If a man be conuict of heresie before the Ordinary, whether his goods bee forfeited.

Cap. 29.

¶ It appeareth in Summa Angelica in § title Doctrina prima the 13. article, that he that is an heretike may not make Executors, for in the
 P 4. law

The 29. Chapter.

law his goods be forfeit: what is the law of the realin therein: S. If a man be conuict of heresie and abiure, he hath forfeit no goods, but if hee be conuict of heresie, & be deliuered to lay mens hands, then hath he forfeit al his goods that he hath at that time that he is deliuered to them, though he be not put in execution for the heresie: but his lands he shal not forfeit, except hee be dead for the heresie, & then he shal forfeit the to the lordes of the fee, as in case of felony, except they be holden of the Ordinarie, for then the King shal haue the forfeiture, as it appeareth by a statute made the second yeare of H. 5. Cap. 7. D. Hee thinketh that as it belongeth onely to the Church to determine heresies, that so it belongeth to the Church, to determine what punishment hee shal haue for his heresie, except death, which they may not be iudges in: but if the Church, decree, that he shal therfore forfeit his goods, we thinketh that they bee forfeit by that decree: St. May verily, for they be temporal, and belong to the iudgement of the Kings Court, and I think the Ordinary might haue set no fine vpon one impeached of heresie, till it was ordained by the Statute of H. 4. that hee may set a fine in that case if hee see cause, & then the king shal haue that fine, as in the said statute appeareth.

¶ Where diuers patrons of an Aduowson, and the Church voideth, the patrons vary in their presentments, whether the Bishop shal haue libertie to present which of the incumbents that he will, or not.

Cap. 30.

This questiō is asked in Sūma Rosella, in the title Patronus the 9. article, & there it appeareth by the better opinion, & he may present whether clark he wil, howbeit & maker of the said sum, saith by the rigoz of the law, the Bishop in such case may present a strāger, because the patrons agree not, & in & same chap. Patronus the 15. article, it is said, & hē must bee preferred that hath the most merits & hath the most part of the patrons: and if the number be egal, that thē it is to consider the merits of the patron, & if they bee of like merit, then may the Bishop command them to agree and to present again. And if they cannot yet agree, then the liberty to present is given to the Bishop to take which he wil: & if he may not yet present without great trouble, thē shall the bishop order the Church in the best maner he can: & if he cannot order it, then shal he suspend the church, & take away the relicks to the rebukes of the patrons: and if they will not so be ordered, then must hee aske help of the tempozalty: And in the 15. article of the said title Patronus, it is asked, whether it be expedient in such case, that the moze part of the patrons agree, hauing respect to all the patrons, or that it suffice to haue the moze part in comparison of the lesse part, as thus: There be foure patrons to present one clark: the first and second present one, the third presenteth another, and the fourth another, hē that is presented by 2. hath not & moze part in comparison of all the patrons, for they be egal, but hē hath the moze part hauing respect to

The 30. Chapter.

the other presentments: to this question it is answered, that either the presentment is made of them þ̄ be of the colledge, & there is requisite the moze part hauing respect to al the colledge, or els euery mā presenteth for himself, as commonly do lay mē þ̄ haue the patronage of their patrimony, & then it sufficeth to haue the moze part in respect of the othee parties, doth not the law of England agree to these diuersities? Se. Ido verily. D. What order then shalbe taken in the law of England, if þ̄ patrons vary in their presentments? S. After the lawes of England this order shalbe taken: If they be iointenāts, or tenāts in cōmon of þ̄ patronage, & they vary in presentment, the Ordinary is not bound to admit none of their clerks, neither þ̄ moze part nor the lesse, & if the vij. monethes passe or they agree, then he may present by the lays, but he may not present wīn þ̄ 6. monethes, for if he do, they may agree and bring a quare in þ̄ against him, & remoue his clerke, & so the ordinary shall be a disturber: and if the patrons haue the patronage by descent as coparceners, then is the Ordinary bound to admit the clerk of the eldest sister, for the eldest shal haue the preferment in the law, if she wil, & then at the next avoidance the next sister shal present, and so by turne one sister after another, till all the sisters or their heirs haue presented, & thē the eldest sister shal begin again: and this is called a presenting by turn, & it holdeth alway betwē coparceners of an aduowso, except they agree to present together, or that they agree by cōposition to present in some other maner, and if they do so, the
agrees

agreement must stand: but this must be alway
except, that if at the first avoidance that shalbe
after the death of the common ancestor, h̄ king
haue the ward of the youngest daughter, h̄ the
king by his prerogative shal haue the pre-
sentment, and at the next avoidance the eldest
sister, and so by turne. But it is to vnderstand
h̄ if after the death of the comon ancestor the
church voideth, and the eldest sister presented
together with another of h̄ sisters, & the other
sisters euery one in their owne name or toge-
ther, that in h̄ case the Ordinary is not bound
to receiue none of their Clerks, but may suffer
the church to run into the laps, as it is said be-
fore: for he shal not be bound to receiue a clerk
of the eldest sister, but where she presenteth in
her own name. And in this case where the pa-
trons bary in presentment, the Church is not
properly said Languis, so that the Ordinary
should be bound at his perill to direct a writ to
inquire de iure patronatus: for that writ lieth
where 1. present by several titles, but these pa-
trons present al w̄ one title, & therfore the Or-
dinary may suffer it to passe if hee will into the
laps, and this maner of presentments must be
observed in this realme in law and conscience.

¶ How long time the patron shall haue to
present to a benefice.

Cap. 31.

This question is asked in Sūma Angelica
in the title Ius patronatus h̄ 16. article, &
there it is answered, h̄ if the patrō be a lay
man that he shal haue 4. moneths, & if hee be a
P̄ny. Clarke.

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Clarke, he shal haue 6. moneths. S. And by the common law he shal haue 6. moneths whether he be a lay man or a clarke, and I see no reason why a clark should haue moze respit than a lay man, but rather the contrary. D. From what time shal he 6. moneths be accompted? S. That is in diuers maners after the maner of the voidance, for if the church void by death, creation, or cession, the 6. moneths shalbe counted from the death of the encumbent, or from the creation, or cession, whereof the patron shall be compelled to take notice at his peril: & if the voidance be by resignation or depziation, the 6. monethes shall begin when the patron hath knowledge giuen him by the bishop of the resignation or depziation. D. what if hee haue knowledge of the resignation or depziation, and not by the Bishop, but by some other, shall not the sixe moneths begin then from the time of that knowledge? S. I suppose that it shall not begin til he haue knowledge giuen him by the Bishop. D. An vnion is also a cause of voidance, how shall the 6. monethes bee reckoned there? S. There can no vnion bee made but the patrons must haue knowledge, and it must bee appointed who shall present after that vnion, he is to say, one of them or both, either ioyntly or by turn one after another, as the agreement is vpon the vnion, and sith the patron is priuy to the auoidance, and is not ignozant of it, the sixe monethes shall be accompted from the agreement. Doct. I see well by the reason that thou hast made in this Chapter, he ignozance sometime excludeth in the law of England, for in some

some of the said annoyances it shall excuse the patrons, as it appeareth by the reasons aboue, and in some it shall not: wherfore I pray thee shew me somewhat were ignorance excuseth in the Law of England, and where not after thine opinion. S. I will with god will hereafter doe as thou saiest if thou put mee in remembrance therof. But I would yet moue thee somewhat further in such questions as I haue moued thee befoze, concerning the diuersities between the laws of England and other lawes: for there be many moe cases therof, that as mee seemeth haue right great need, for the good order of conscience of many persons, to be refozmed, and to be brought into one opinion both among spirituall and temporal: as it is in the case where Doctozs hold opinion, that the Statute of lay men that restraine liberty to giue lands to the Church should be void, & they say farther, that if it were prohibit by a statut that no gift should be made to forreines, that yet a gift made to the church should be good, for they say, that the inferiour may not take away the authoritie of the superiour, & this saying is directly against the statuts, wherby it is prohibit, that lands should not be giuen into Mortmain: & they say also that bequests & gifts to the church must be determined after the law Canon, & not after the laws & statuts of lay men, and so they regard much to whom the gift is made, whether to the Church or to make causes, or to comon persons, & beare moze fauor in gifts to the Church than to other: and the law of the Realme beholdeth the thing that is
giuen

The 32. Chapter.

giuen and pretended, that if the thing that is giuē be of lands or goods, that the determination thereof, of right belongeth in this realme to the kings lawes, whether it be to spirituall men or tempozal, to the church, or to other, and so is great diuision in this behalf, & hē one preffereth his opinion, & another his, & one this iurisdiction, & another that, and that as it is to feare more of singularity than of charity: wherefore it seemeth, that they that haue the greatest charge ouer the people, specially to the health of their soules, are most bound in cōscience before other to looke to this matter, & to do that in this is in all charity to haue it reformed, not beholding the tempozal iurisdiction nor spiritual iurisdiction, but the cōmon wealth, & quietnesse of the people: & that vndoubtedly would shortly follow, if this diuision were put away, which I suppose verily wil not be, but yet al men within the realme both spiritual & tempozal be ordered & ruled by one law, as to tempozal things: notwithstanding forasmuch as the purpose of this writing is not to treat of this matter, therefore I wil no farther speake thereof at this time. D. Then I pray thee proceed to an other question, that thou saiest thy mind is to do. S. I will with godd will.

¶ If a man be excommenged, whether he may in any case be assoiled without making satisfaction.

Cap. 32.

In the sum called Summa Rosella, in the title Absolutio quarta, the second article, it is said

said, that he that is excommunicat for a wrong
 if he bee able to make satisfaction, ought not to
 be assolued but he do satisfie, & that they offend
 that do assoule him but yet neuer theles he is as-
 soiled, & if he be not able to make amends, that
 he must yet be assolued, taking a sufficient gage
 to satisfie if he be able hereafter, or els that hee
 make another to satisfie if he be able. And these
 sayings in many things hold not in the lawes
 of England. D. I pray thee shew me, wherein
 the law of the realme varieth therefrom. S. If
 a man be excommunicat in the spiritual court
 for debt, trespass, or such other things as becomg
 to the kings crowne, and to his royall dignitie,
 there hee ought to be assolued without making
 any satisfaction for the Spirituall court excee-
 deth their power in that they held ples in those
 cases, & the party if he will may therupon haue
 a *Præmunie facias*, aswell against the partie
 that sued him, as against the Judge: therefore
 in this case they ought in conscience to make
 absolution without any satisfaction, for they not
 onely offended the party in calling him to an-
 swere before them of such things as belong
 to the law of the realme, but also the king: for he
 by reason of such suits, may lose great aduan-
 tages, by reason of the writs originals, iudi-
 cials, fines, amerciements, & such other things
 as might grow to him if suits had bin take in
 his courts according to his lawes: & according
 to this saying it appeareth in diuers statutes,
 that if a man lay violent hands vpon a clerke,
 and beat him, that for the beating amends shal
 be made in the kings court, and for the laying
 of

The 32. Chapter.

of violent hands vpon the Clark, amends shal
be made in the Court christian. And therfore if
the Judge in the court christian would award
the partie to yeild damages for the beating, he
did against the statute. But admit that a man
be excommuniced for a thing that the spirituall
Court may award the party to make satisfacti-
on of, as for the not inclosing of the Church
yard, or for not apparelling of the church con-
ueniently: Then I think the party must make
restitution, or lay a sufficient caution if he be a-
ble or he be assolied: but if he party offer suffici-
ent amends, and haue his absolution, and the
Judge will not make him his letters of abso-
lution, if the excommunication bee of Record
in the Kings Court, then the king may write
vnto the spirituall Judge, commaunding him
that hee make the party his letters of abso-
lution vpon paine of contempt: & if the said ex-
communication be not of Record in the kings
Court, then the party may in such case haue
his actiō against the Judge spirituall, for that
hee would not make him his letters of abso-
lution: but if he be not assolied, or if he be not able
to make satisfaction, and therfore the Judge
spiritual will not assolie him, what the Kings
Lawes may do in this case I am somewhat in
doubt, & wil not much speake of it at this time,
but as I suppose, he may aswel haue his actiō
in that case for the not assolting him, as where
he is assolied, and if the Judge will not make
him his letters of absolution: and I suppose
the same law to be where a mā is accursed for
a thing that the Judge had no power to accurse
him

him in, as for Debt, Trespasse, or such other. Do. There he may haue other remedies, as a *Præmunire facias*, or such other, and therfore I suppose the other action lyeth not for him.

S. The Judge and the partie may be dead, & then no *Præmunire* lieth, & though they were aliue, and were condemned in *Præmunire*, yet that should not auoid the excommungement: & therfore I thinke the action lyeth, specially, if he be thereby delayed of actions that hee might haue in the Kings Court, if the said excommungement had not bin.

¶ Whether a Prelate may refuse a
Legacy.

Cap. 33.

IT is mooued in the said sum, named Rosella in the title *Alienatio* 20. the 11. article, whether a prelat may refuse a legacy, wherin diuers opinions be recited ther, which as me thinke, haue not after the lawes of this realme to be moze plainly declared. D. I pray thee shew me what the law of the realme will therein. Sen. I thinke that euery Prelat and soueraigne that may onely sue, and be sued in his owne name, as Abbots, Priors, and such other, may refuse any legacy that is made to the house: for the legacy is not perfect till hee to whom it is made assent to take it, for else if hee might not refuse it, he might be compelled to haue lands wherby he might in some case haue great losse, but

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but then if he intend to refuse, he must as soone as his title by the legacy falleth, relinquish to take the profits of the thing bequeathed, for if one take the profits thereof, he shal not after refuse the legacy: but yet his successor may if he will refuse the taking of the profits to save the house from yeelding damages, or from arrerages of réts, if any such be: & like law is of a remainder, as is in legacy, for though in þe case of a remainder, & also of a devise as most n^e say, the freehold is cast vpon him by the law when the remainder or devise falleth: yet it is in his liberty, to refuse the taking of the profits, & to refuse the remainder if he will, as he might doe of a gift of lands, or goods, for if a gift bee made to a man that refuseth to take it, the gift is void, & if it be made to a man that is absent, the gift taketh no effect in him till hee assent: no more than if a man disseise one to another mans vse, hee to whose vse the disseisin is made, hath nothing in the land, ne is no disseisor till hee agree: And to such disseisins & gifts, an Abbott or Prior may disagree, as wel as any other mā. But after some men a bishop, of a devise, or remainder that is made to the bishop, and to the Deane and Chapter, nor a Deane and a chapter of a devise or remainder made to them, ne yet the master of a colledge of such a devise, or remainder made to him & to his brethren, may not disagree without the Chapter or brethren: for the Bishop of such land as hee hath with the Deane and chapter, ne the Deane nor master of such land as they haue with the Chapter or brethren may not auindere without the

the chapter & brethren: & therefore some say that if the Deane or master will refuse, or disclaime in the lands, that they haue by the deuise or remainder, that disclaimer without the chapter or brethren is void. And therefore it is holden in the law, that if a Bishop be vouched to warrant, & the tenant bindeth him to the warranty by reason of a lease made to him by the Bishop, and by the Deane & the chapter, paying a rent: that in that case the Bishop may not disclaime in the reuerſion without the assent of the Deane and Chapter: But yet if a reuerſion were granted to a Deane & a Chapter, and the Deane refuse, the graunt is void. And so it appeareth that a Deane may refuse to take a gift, or grant of lands, or goods, or of a reuerſion made to him and to the chapter, and yet he may not disagree to a remainder, or deuise, & the diuersity is because the remainder and deuise be cast vpon him without any assent, whereupon neither the Deane or the Chapter by themselves, may in no wise disagree without the assent of the other: But a gift or grant is not good to them without they both assent, & in such gifts, as I suppose, an Infant may disagree as well as one of full age, but if a woman conuert disagree to a gift, and the husband agree, that gift is good. D. What if the lands in that case of a man & his wife be charged with damages, or be charged with more rent than the land is worth, and the husband dye, shal the wife be charged to the damages, or to the rent? S. I thinke nay, if the wife refuse the occupation of the ground after her husbands death,

and

The 33. Chapter.

and I thinke the same law to be, if a leas be made to the husband and the wife, yielding a greater rent than the land is worth, that the wife after the husbands death may refuse the lease to save her from the payment of the rent: & so may the successor of an Abbot. Do. And if the husband in that case overline the wife, & the make his executors and die, whether may his executors in like wise refuse the lease? S. If they have goods sufficient of their testator to pay the rent, I thinke they may not refuse it: but if they have not goods sufficient of their testator to pay the rent to the end of the terme, I thinke if they relinquish the occupation, they may by speciall pleading discharge themselves of the rent & lease, & if they do not, they may lightly charge themselves of their owne goods. And if a leas be made for terme of life, the remainder to an Abbot for terme of life of J. at S. reserving a greater rent than the land is worth, & after the tenant for terme of life dieth, the Abbot may refuse the remainder for the cause before rehearsed: and in case that the Abbot assent to the remainder, whereby he is charged to the rent during the tyme that hee is Abbot, and after he dyeth or is deposed, leaving the said J. at S. in that case his successor may discharge himselfe by refusing the occupation of the land, as is aforesaid. But I thinke that if such a remainder were made to a Deane, and to the Chapter, and the Deane agree without the assent of the Chapter, that in that case the Deane and the Chapter may afterward disagree to the remainder, and that the act of the Deane
With

out the assent of the Chapter shall not charge the Chap. in h behalf. And thus it appeareth, though the meaning of the said chapter & article in the said summe be, that a Prelat may not disagree vnto a legacy, for hurting of a house, yet he may after the lawes of the realm disagree thereto, where it should hurt his house. And if in a *Præcipe quod reddat*, ther be but one tenānt be he spiritual or temporal, & he refuse by way of disclaimer in such case, where hee may disclaime by the law, there the land shal best in h demandant: & if there be 2. tenants, then it shal best in his fellow, if hee will take the whole tenancy vpon him, or els it shal best in the demandant. But if an Abbot or a lay man refuse the taking of the profits, and shew a speciall cause why it should hurt him if he do assent, and bee thereby discharged as is said before: in whom the land shal then best it is moze doubt, whereof I wil no farther speak at this time. And thus it appeareth by diuers of the cases that be put in this chapter, that he that is ignozant in the law of the realme, shal lack the true iudgement of conscience in many cases. For in many of these cases that may be done therein by the law, must also be obserued in conscience &c.

¶ Whether a gift made vnder a condition be void if the foueraigne onely breake the condition.

Cap. 34.

IN *summa Roselli* in h title *Alienatio*, the 12. article, is asked this question, whether a gift made

The 34. Chapter.

made vnder a certaine forme may bee auoyded
or reuoked, because the prelates or soueraigne
onely did breake the forme, and it is there an-
swered, that it may not, for that the deed of the
Prelat onely ought not to hurt the Church:
and if those words (vnder a maner) be vnder-
stood of a gift vpon condition as they seeme to
be, then the said solution holdeth not in this
realme neither in law nor conscience. D. What
is then the law of England if a man enteele
an Abbot by deed, indented vpon condition,
that if the Abbot pay not the feoffor a certain
summe of money at such a day, that then it
shall bee lawfull to the feoffor to reenter, and
at that day the Abbot faileth of his payment,
may the feoffor lawfully reenter and put out
the Abbot?

S. Yea verily, for he had no right to the land
land, but by the gift of the feoffour, and his gift
was conditional, & therfore if the condition be
broken, it is lawfull by the law of England for
the feoffor to reenter, and to take his land again
& to hold it as in his first estate: by which reen-
try after the lawes of the realme, he disproueth
the first iury of seisin, and all the mesne act es-
doe between the first feoffement and the reen-
try: and it forcé. h little in the Law, in whom
the default be that the condition was not per-
formed whether in the Abbot or in his couent,
or in both, or in any other person whatf. euer
he be, except it bee in the feoffor h selfe. And
it is great diuersity between a cleere gift made
to an Abbot without condition, and where it is
made with condition. f. 2. whe it is made with-
out

out condition, the act of the Abbot onely shall not by the common law disherit the house, but it bee in very few cases: but yet upon diuers statutes the sufferance of the Abbot only may disherit the house, as by his ceasser, or by lea-
 uing of a crosse vpon a house against the sta-
 tute therof made, in which case the house ther-
 by shall lose the land, and some say that by the
 common law vpon his disclaimer in auowry,
 a writ of right of disclaimer lieth, but if the gift
 bee vpon condition, it standeth neither with
 law nor conscience, that the Abbot should haue
 any moze perfect or sure estat than was giuen
 vnto him: and therfore as the said estat was
 made to the house vpon condition, so that estat
 may be auoided for not performing of the con-
 dition. And I think verily that this I haue
 said is to be holden in this realme, both in the
 Law and conscience, and that the decrees of
 the Church to the contrarie, bind not in this
 case. But if the lands be giuen to an Abbot,
 and to his Couē, to the intent to find a lamp,
 or to giue certaine alms to poore men, though
 the intent be not in those cases fulfilled, yet the
 feoffor, nor his heire may not reēter: for hee
 reserved no reētry by expresse words, ne in
 the words, when he said, to the intent to find
 a Lampe, or to giue almes &c. is implied no
 reētry, ne the feoffor, nor his heires shall haue
 no remedie in such cases, vntlesse it be within
 the case of the statute of Westminster the se-
 cond, that giueth the Cessauit de Cantaria.

The 35. Chapter.

¶ Whether a couenant made vpon a gift to the Church, that it shall not be aliened, be good.

Cap. 35.

In the said sum, called Summa Rosella, the said title Alienatio, the 14. article, is asked this question, whether a couenant made vpon a gift to the Church, that it shal not be aliened, be good. And the same questiō is moued again in the said Summa called Rosella, in the tytle Cōditio the first article, & in Summa Angelica, in the title Donatio prima, the 71. & 72. articles. ¶ The intent of this question there, is whether notwithstanding that the condition be good to some alienations, whether that yet it be good to re- straine alienations for the redemption of the which be in captiuitie vnder the Infidels, or for the greater aduantage to the house: & though the better opinion be there, whether the condition may not be broken for redemption of the which be in captiuitie, yet it is in maner a whole opinion that it may be sold for the greater aduantage to the house: for it is said there that it may not be taken, but that the intent of the giuer was so, & therefore they call the condition that prohibiteth it to be sold, *conditio iurpis*, that is to say, a vile condition, wherefoze they regard it not: but verily as I take it, if a condition may re- straine any maner of alienation, then it shal as wel restraine Alienations for the two causes before rehearsed, as for any other causes: and though me thinketh that the condition is good, & after

after the lawes of the Realme, that vpon gifts to the Church restraineth alienations, yet I shall touch one reason that is made to the contrary, that is this: There is a cleere ground in the law, that if a feoffment be made to a common person in fee, vpon condition that the lessee shal not alien to no man, that condition is void, because it is contrary to the estate of a fee simple, to bind him that hath the estate, that he should not alien if he list: and some say that an Abbot that hath land to him and to his successors hath as high and as perfit a fee simple as hath a lay man that hath land to him and to his heires, and therefore they say, that it is as well against the Law of the Realme to prohibite that the Abbot shal not alien, as it is to prohibite a lay man thereof: and though it be therein true as they say, as to the highnesse of the estate, yet me thinketh there is a great diuersitie between the cases concerning their alienations: for when lands be giuen in fee simple to a common person, the intent of the Law is that the feoffee shal haue power to alien and if he do alien, it is not against the intent of the Law, ne yet against the intent of the fessor: but when lands be giuen to an Abbot and to his successors, the intent of the law is, and also of the giuer (as it is to presume) that it should remaine in the house for euer, and therefore it is called Mortmain, that is to say, a dead hand, as who saith that it shal abide there alway as a thing dead to the house. And therefore as I suppose the law will suffer that condition to be good, that is made to restraine that such Mort-

The 35. Chapter.

main should not be aliened, and that yet it may prohibite the same condition to be made vpon a feoffment made in fee simple to a man and to his heires : for that is the most high, the most free, and the most pure estat that is in the law. But the law suffereth such a condition to be made vpon a gift in taile because the Statute prohibitheth that no alienation should be made thereof. And then as the law suffereth such a condition vpon a gift in Mortmaine, that is to say, that it shall not be aliened, to be good : then it Judgeh the condition also according to the words, that is to say, if the condition bee general that they shall alien to no man, as this case is, that it shalbe taken generally according to the words, and it shal not be taken, that the intent of the giver was otherwise than he expressed in his gift : though perchance if he were alive himselfe and the question were asked him whether he would be contented it should be aliened for the said two causes or not, hee would say ye, but when he is dead no mā hath authoritie to interpret his gift otherwise than the law suffereth, nor otherwise than the words of the gift be. And if the condition be speciall, that is to say, that the land shal not be aliened to such a man or such a man, then the condition shall be taken according to the words. & then they may be aliened as for that condition to any other, but to them to whom it is expressly prohibited that the land should not be aliened to. And if the lands in that case bee aliened to one that is not excepted in the condition, the he may alien the land to him that is first excepted with:

Without breaking of the condition, for conditions be taken straitly in the law and without excuse. And thus we thinketh, that because the said condition is general, and restraineth all alienations, that it may not be aliened neither by the law of the Realme, ne yet by conscience no more for the said two causes, than it may for any other cause: and this case must of necessity be iudged after the rules and grounds of the Law of the Realme, and after no other law as we saiemeth.

¶ If the Patron present not within 6. monethes, who shall present.

Cap. 36.

In the same sum, called Summa Rosell², in § title Beneficium, in principio it is asked, if the patron present not within six monethes, who shall present, and within what time the presentment must be made. And it is answered there, that if the patron present not within six monethes, that the Chapter shall have six monethes to present, and if the Chapter present not within vi. monethes, that then the Bishop shall have other 6. monethes. And if he be negligent, then the Metropolitan shall have other 6. monethes, and if he present not, then the presentment is deuolute to the Patriarke. And if the Metropolitan haue no superior vnder the Pope, then the presentment is deuolute to the

¶ Itij.

Pope.

The 36. Chapter.

Pope. And so, as it is said ther, the Archbishop shall supply the negligence of the Bishop, if he be not exempt, and if he be exempt, the presentment immediatly shall fall vpon the Bishop, to the Pope. And as I suppose these diuersities hold not in the lawes of the realme. Do. Then I pray that shew me who shall present by the lawes of the realme, if the patron doe not present within vij. monethes. S. Then for default of the patron the bishop shal present vnles the king be patron, and if the Bishop present not within vij. monethes, then the Metropolitane shall present, whether the Bishop be exempt or not. And if the Metropolitane present not within the time limited by the law, then there bee diuers opinions who shall present, for s. me say the Pope shall present, as it is said before, and s. o. say the king shall present.

D. What reason make they that say the king should present in that case. S. This is their reason they say that the king is patron paramount of all the benefices within the realme. And they say further, that the king and his progenitors kings of England, without time of mind, haue had authoritie to determine the right of patronages in this Realme in their owne courts, and are bound to see their subjects haue right in that behalfe within the realme, and that in that case from him lyeth no appeale. And then they say, that if the Pope in this case should present, that then the king should not onely lose his Patronage paramount, but also that he should not sometime be able to do right to his subjects.

D. In what case were that? S. It is in this case: The Law of the Realme is, that if a benefice fall void, the patron shal present within vi. monethes, and if he do not, that then the Ordinarie shall present, but yet the Law is farther in this case, that if the Patron present before the Ordinarie put in his Clerke, that then the Patron of right shall enjoy his presentment, and so it is though the time should fall after to the Metropolitane, or to the Pope; and if the presentment should fall to the Pope, then though the Advowson abode still void, so that the Patron might of right present, yet the Patron should not know to whome hee should present, vntlesse hee should goe to the Pope, and so hee should faile of right within the Realme. And if percase he went to the Pope, and presented an able Clerke vnto him, and yet his Clerke were refused and another put in at the collation of the Pope, or at the presentment of a straunger, yet the Patron could haue no remedie for the wrong within the Realme, for the Incumbent might abide still out of the Realme. And therefore the law will suffer no title in this case to fall to the Pope. And they say, that for a like reason it is, that the Law of the Realme will not allow an excommunication that is certified into the kings Court vnder the Popes Bulles: for if the partie offered sufficient amends, and yet could not obtaine his letters of absolution, the king should not know to whom to write for the letters of Absolution, and the party could not haue right, and that the Law will in no wise

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Wise suffer. Do. The patron in that case may present to the Ordinary as long as the church is void, and if the ordinarie accept him not, the Patron may haue his remedy against him within this Realme. But if the Pope will put in an Incumbent before the Patron present, it is reason that he haue the presentment, as mee cometh before the king. S. When the Ordinary hath surcesed his time, hee hath lost his power as to that presentment, specially if the collation bee deuolute to the Pope. And also when the presentment is in the Metropolitane he shal put in the clerke himselfe, and not the Ordinary: and so there is no default in the Ordinary, though he present not the Clerke of the Patron, if his time be past, and so there lyeth no remedy against him for the Patron.

D. Though the Incumbent abide still out of the realm, yet may a Quare impedit lie against him within the realme: and if the Incumbent make default vpon the distresse, and appeare not to shew his title, then the patron shall haue a writ to the Bishop according to the statute, and so he is not without remedy.

S. But in this case he cannot be summoned, attached, nor distrained, within the Realme. D. He may be summoned by the church as the tenant may in a Writ of right of Aduowson. S. There the aduowson is in demand, & here the presentment is onely in debate: and so hee cannot bee summoned by the Church here no more than if it were in a writ of Annuity, and ther the common returne is, quod Clericus est beneficiarius, non habet laicum feod' vbi potest sum.

Summoneri. And though he might be summoned in the Church, yet he might neither be attached nor distrained there, and so the patron should be without remedy. D. And if he were without remedy, he should yet be in a good case as he should be if the king should present: for if the title should be given to the king, the Patron had lost his presentment clerly for the time, though the Church abide still void. For I have heard say that in such presentments no time after the Law of the Realme runneth unto the king. S. That is true, but there the presentment should be taken from him by right and by the Law, as here it should be taken from him against the Law, and there as the Law could not help him, and that the law will not suffer. D. Yet me thinketh alway that the title of the Laps in such case is given by the law of the Church, & not by the temporal law, & therfore it forceth but little what the temporal law wil in it, as mee seemeth S. In such countries where the Pope hath power to determine the right of temporal things, I thinke it is as thou saist, but in this realme it is not so. And the right of presentment is a temporal thing, and a temporal inheritance, & therfore I thinke it belongeth to the Kings law to determine, & also to make lawes who shal present after 6. monethes aswell as before, so that the title of examination of abilitie or nonabilitie be not therby taken from the Ordinarie. And in likewise it is of avoidance of benefices, that is to say, then it shalbe iudged by the Kings Lawes when a benefice shall be laid void, & when not, and

The 36. Chapter.

and not by the law of the Church, as when a parson is made a Bishop, or accepteth another benefice without a licence, or resigneth, or is deprived, in these cases the common law saith, that the benefice is void, and so they should be, though a law were made by the Church to the contrary: and so if the Pope should haue any title in this case to present, it should bee by the Law of the Realme. And I haue not so ne heard that the law of the Realme hath giuen any title to the Pope to determine any temporal thing that may be lawfully determined by the Kings court. D. It seemeth by that reason that thou hast made now, that thou preferrest the Kings authority in presentments before the Popes, & that me thinketh should not stand with the law of God, sith the Pope is the vicar generall vnder God. S. That I haue said proueth not, that for the highest preferment in presentments he is to haue authoritie to examine the abilitie of the Parson that is presented: for if the presenter be able, it sufficeth to the discharge of the Ordinarie, by whom soeuer he be presented, and that authoritie is not denyed by the law of the Realme to belong alway to the spirituall iurisdiction: but my meaning is, that as to the right of presentment, and to determine who ought to present, and who not, and at what time, and when the Church shall be iudged to be void, & when not, belong to the King & to his laws: for else it were a thing in vaine for him to hold place of Adversors, & to determine the right of patronage in his own courts, and not to haue authoritie to determine

the right thereof, and those claims seemeth not to be against the law of God And so mee seemeth in this case the presentment is giuen the King. D. And if the King should haue right to present, then might the Church happen to continue void for ever, for as we haue said before no time runneth to the King in such presentments. S. If any such case happen, if the King present not, then may the Ordinary set in a deputy to serue the cure as he may do when negligence is in other patrons that may present & do not: and also it cannot be thought that the King which hath the rule & gouernance ouer the people, not only of their bodies, but also of their soules, will hurt his conscience and suffer a benefice continually to stand without a Curat, no more than he doth in Abououlongs that be of his owne presentment.

¶ Whether the presentment and collation of benefices and dignities, voiding at Rome, belongeth only to the Pope.

Cap. 37.

In the same sum, called Summa Rosella, in the title Beneficium primū, in the 13. article, It is said of benefices, dignities, & parsonages, voiding in the court of Rome may not be giue but by the Pope: & likewise of the Popes seruants and of other that come and go from the Court, if they dye in places nigh to the Court within two daies iourney, all these belong to the Pope: but if the Pope present not with
in a

The 37. Chapter.

in a moneth, then after the moneth they to whō
it belongeth to present, may present by them-
selues only, or by their vicar generall if they be
in far parts: and these sayings hold not in the
law of the Realme. D, what is the cause that
they hold not in this realme, as wel as in al o-
ther realmes? S. One cause is this: The king
in this realm according to the ancient right of
his Crowne, of all his aduowsons that bee of
his patronage ought to present. And in like-
wise other Patrons of benefices of their pre-
sentmēt, & the pīces of pī right of presentments
of benefices within this Realme, belong to the
King and his crowne. And these titles cannot
be taken from the King and his subjects, but
by their assent, and the law that is made there-
in to put away the title, bindeth not in this
realme. And ouer that befoze the statute of 15.
E. 3. there was a great inconuenience and mis-
chiefe, by reason of diuers prouisions & reser-
uations, that the Pope made to the benefices
of this Realme, contrarie to the old right of
the King and other patrons of this Realme.
aswel to the Archbishopps, Bishopps, Bishoppicks,
Deanries and Abbies, as to other dignities &
benefices of the Church. And many times ali-
ens thereby had benefices within the Realme
that vnderstand not the English tongue, so
they could not counsaile ne comfort the people,
when need required, and by that occasiō great
riches was conueyed out of the Realme: wher-
foze to auoid such inconuenience, it was or-
dained by the said Statut, that al patrons aswel
spiritual as temporal should haue the present-
ments

ments freely: & in case the collation or prouisiō were made by the Pope in disturbance of any Spiritual Patron, that then for that time the King should haue the presentment, & if it were in disturbance of any lay Patron, that then if the patron presented not within the halfe yere after such voidance, nor the Bishop of the place within a moneth after the halfe yere: that then the king should haue also the presentment, and that the king should haue the profits of the benefices so occupied by prouisiō, except Abbies & Priories, & other houses that haue Colledge & couent, & there the colledge & couent to haue the profits: and because the statute is generall, & excepteth not such benefices as shall void in the Court of Rome, or in such other place as before appeareth, therefore they be taken to bee within the prouision of the said estatute as well as the benefices that void within the Realme: & all prouisors & executors of the said collations & prouisions, & al their attornies, notaries & maintainers, shal be out of the protection of the King, & shal haue like punishment as they should haue for executing of benefices voiding within the realm. D. But I cannot see how the said statute may stand with conscience, that so farre restraineth the Pope of his liberty, which as me seemeth he ought in this case of right to haue. S. Because (as I suppose): that patrons ought of right to haue their presentments, vnder such manner as they claime them in this realme, as I haue said before, & as in the 26. chapter of this booke appeareth more at large. And also forasmuch as it appeareth evidently,

that

The 38. Chapter.

that great inconuenience folloved vpon the said prouisions, and that the said estatute was made to auoid the same, which sith that time hath been suffered by the Pope, and hath bene alway vsed in this realme without resistance, that the sayd estatute should therefore stand with good conscience.

¶ If a house by chaunce fall vpon a horse that is borrowed, who shall beare the losse.

Cap. 38.

In the said Summe called Summa Rosella, in the title *Calus fortuitus*, in the beginning is put this case. If a man lend another a horse, which is called there *Depositum*, & a house by chance falleth vpon the horse, whether in that case hee shall answer for the horse? And it is answered there, that if the house were like to fall, that then it cannot be take as a chance, but as the default of him that had the horse deliuered to him: But if the house were strong, & of likelyhood and by common presumption in no daunger of falling, but that it fell by sodaine tempest, or such other casualtie, that then it shalbe taken as a chance, and hee that had the keeping of the horse shal be discharged: & though this diuersitie agreeth with the Lawes of the Realme, yet for the more plainer declaration therof, and for the more like cases and chances that may happen to goodes, that a man hath

in his keeping that be not his owne, I shall ad
 a little moze thereto, that shalbe somewhat neces-
 sary as we thinketh to the ordering of consci-
 ence. First a man may haue of another by way
 of lene or borrowing, money, cozne, wine, and
 such other things where the same thing cannot
 be deliuered if it be occupied, but another thing
 of like nature & like value must be deliuered
 for it, & such things he that they be lent to, may
 by force of the lene vse as his owne. And ther-
 fore if they perish, it is at his teopardy, & this
 is most properly called a lene. Also a man may
 lend to another a horse, an oxe, a cart, or such o-
 ther things that may be deliuered againe, and
 they by force of that lene may be vsed & occu-
 pied reasonably in such manner as they were
 borrowed for, or as it was agreed in the time of
 the lene that they should be occupied, & if such
 things be occupied otherwise the according to
 the intent of the lene, & in that occupation they
 perish, in what wise soeuer they perish so it bee
 not in default of the owner, he that borrowed
 them shalbe charged therewith in law & consci-
 ence: & if he that borrowed thā occupy them in
 such maner as they were lent for, & in that oc-
 cupation they perish in default of him that they
 were lent to, then hee shall answer for them:
 and if they perish not through his default, then
 hee that oweth them shall beare the losse. Al-
 so if a man haue goods to keep to a certain day,
 for a certaine recompence for the keeping, he
 shall stand charged or not charged, after as de-
 fault or no default shall bee in him as be-
 fore appeareth, and so it is if he haue nothing

The 38. Chapter.

for the keeping, but if he haue for the keeping, & make promise at the time of the deliuey to redeliuer them safe at his perill, then he shall be charged with all chances that may fall. But if he make that promise & haue nothing for keeping, I think he is bound to no such casualties but that be wilful & his owne default, for that is a nude, or a naked promise, wherupon as I suppose no action lieth. Also if a man find goods of another, if they be after hurt or lost by wilful negligence, he shalbe charged to the owner, but if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliuer them to another to keepe & runneth away with them, I think he be discharged: & these diuersities hold most commonly vpon pledges, or where a man hireth goods of his neighbour to a certain day for certaine mony, & many other diuersities be in the law of the Realme, what shalbe to the iopardy of the one, & what of the other, which I will not speake of at this time: And by this it may appeare that it is commonly holden in the laws of England if a common carier go by the waies that be dangerous for robbing, or driue by night, or in other inconvenient time, & be robbed, or if he ouercharge a horse, whereby he falleth into the water or otherwise, so that the stuffe is hurt or impaired: that he shall stand charged for his misdemeanour, and if he would percase refuse to carry it, vnlesse promise were made vnto him that he shal not be charged for no misdemeanour that should be in him, the promise were void: For it were against reason & against good maners, and

and so it is in all other cases like. And all these diuerſities be granted by ſecundary cōcluſions deriued vpon the Law of reaſon, without any ſtatute made in that behalfe. And peraduenture lawes, and the concluſions therein, be the moze plaine & the moze open. For if any ſtatute were made therein, I think verily no doubts & queſtions would riſe vpon the Statute, than doth now when they be onely argued & iudged after the common law.

¶ If a Prieſt haue won much goods by ſaying of Maſſe, wether he may giue thoſe goods or make a will of them.

Cap. 39.

In the ſaid ſum caller, Summa Roſella in the title Clericus quartus the third article, is aſked this queſtiō: If a prieſt haue won much goods by ſaying of maſſe, whether he may giue thoſe goods, or make a will of them: whereto it is answered there, that he may giue them, or make a will of them, ſpecially when a man bequeeth mony for to haue Maſſes ſaid for him: & the like law is of ſuch things as a clerke winneth by the reaſon of an office: For it is ſayd there, that ſuch things come to him by reaſon of his owne perſon: which ſayings I think accord w the law of England. For to ſomuch as in the ſaid article & in diuers other places of the ſaid Chapter, & in diuers other chapters of the ſaid Summe, is put great diuerſitie betwene ſuch goods, as a Clerke hath by reaſon of his

The 39. Chapter.

church, and such goods as he hath by reason of his person, & that he must dispose such goods as he hath by reason of his church in such manner as is appointed by the law of the Church, so that he may not dispose them so liberally, as he may the goods he come by reason of his own person, therefore I shall a little touch what spirituall men may do with their goods after the law of the Realme.

First a Bishop of such goods as he hath with the Deane and Chapter, hee may neither make gift nor bequest, but of such goods as he hath of his owne by reason of his church, or of his gift of his auncestors or of any other, or of his patrimony, he may both make gifts and bequests lawfully. And an Abbot of the goods of his Church may make a gift, and that gift is good as to the Law: but what it is in conscience, that is after the cause and intent and qualitie of the gift, for if it bee so much that it notably hurteth the house or the couent, or if he giue away the bowkes, or the chalices, or such other things as belong to his seruice of God, he offendeth in conscience, and yet he is not punishable in the Law ne yet by Subpena after some men, ne in none otherwise but by the Law of the church, as a waster of the goods of his monastery. But neuertheless I will not fully hold that opinion, as to that that belongeth necessarily to the seruice of God, whether any remedy lye against him or not, but remit it to the iudgment of other. And of a Deane & Chapter, and a Master & brethren of goods that they haue to themselves, & also of goods that they haue with the

the Chapter & brethren, the same diuersity holdeth, as appeareth befoze of a Bishop and the Deane & Chapter, except that in the case of a master & brethren the goods shalbe ordered as shalbe assigned by the foundation. And mozeouer of a Parson of a Church, Vicar & Chauntry priest, or such other, al such goods as they haue aswell such as they haue by reason of the Parsonage, Vicarage, or Chauntry, as that they haue by reason of their owne person, they may lawfully giue and bequeath where they wil after the common Law: And if they dispose part among the parishioners, & part to the buidling of Churches, or giue part to the Ordinarie, or to poore men, or in such other manner, as it is appointed by the law of the church, they offend not therein, vnles they think themselves bounden thereto by dutie, & by authoritie of the law of the church, not regarding the kings lawes, for if they do so, it seemeth they resist the Ordinances of God, which hath giue power to princes to make lawes: but there as the Pope hath souerainty in temporall things, as he hath in spiritual things, there some say that the goods of priests must in conscience be disposed as is contained in the said summe, but that holdeth not in this Realme: for the goods of spirituall men be temporal in what manner soeuer they come to them, and must be ordered after the temporal law as the goods of the temporal men must be. Howbeit if there were a statute made in this case of like effect in many points, as the law of the church is, I thinke it were a right good and a profitable statute.

R. 17.

Who

The 40. Chapter.

¶ Who shall succeed a Clerke that dyeth
intestate.

Cap. 40.

In the said sum called Rosella in the chapter
clericus quat' the 7. article, is asked this
question, who shall succeed to a Clerke that
dyeth intestate, & it is answered, that in goods
gotten by reason of the church, the church shall
succeed. But in other goods his kinsmen shall
succeed after the order of the law, & if there bee
no kinsman, then the church shall succeed. And
it is said further, that goods gotten by a Can-
non secular by reason of his church or prebend
shall not go to his successor in the prebend, but
to the Chapter. But where one that is bene-
ficed is not of the congregation, but he hath a
benefice clerely sepearat', as if he be a parson of
a parish church, or is a president, or an Arch-
deacon not beneficed by the Chapter, then the
goods gotten by reason of his benefice, shall go
to his successor, & not to the Chapter, and none
of these sayings hold place in p'lawes of Eng-
land. D. what is then the Law, if a Parson of
a Church or a Vicar in the Countrey dye in-
testate, or if a Canon secular bee also a Par-
son and haue goods by reason thereof, and also
by a Prebend that hee hath in a Cathedrall
Church, & hee dye intestate, who shall haue his
goods? S. At the common Law the Ordinarie
in al these case may administer the goods, and
after hee must commit administration to the
next

next faithfull friends of him that is dead intestate that will desire it, as he is bound to doe wher lay men & haue goods die intestat. And if no man desire to haue administration, then the Ordinary may administer & see the debts paid, and hee must beware that hee pay the debts in such order as is appointed in the common Law: for if hee pay debts vpon simple contracts before an obligation, he shall bee compelled to pay the debt vpon the obligation of his owne goods, if there be no goods sufficient of him that dyed intestate, and though it be suffered in such case that the Ordinary may pay pound and pound like, that is, to apportion the goods among the debtors after his discretion, yet by the rigor of the common Law, he might be charged to him that can first haue his iudgment against him. And furthermore by that is said afore in the last Chapter it appeareth that if a Bishop that hath goods of his patrimony, or a master of a Colledge, or a Dean of goods, that they haue of their owne onely to themselves dye intestate, that the Ordinary shall commit administration thereof, as before appeareth, and if they make executors, then the executors shall haue the administration thereof: But the heires nor the kinsmen by that reason only that they be heires or of kin to him that is deceased, shall haue no meddling with his goods, except it be by custom of some countries where the heires shall haue their lons, or wher the children (the debts & legacies paid) shall haue a reasonable part of the goods after the custome of the country.

The 41. Chapter.

¶ If a man be outlawed of felony, or be attain-
ted for murder or felony, or that is an as-
cismus, may be slaine by euery
stranger.

Cap. 41.

It appeareth in this said sum called Summa
Angelica in the xxj. Ch. in the title of Ascis-
mus the 2. Paragrafe, that he is an Ascismus
that will slay men for money at the instance of
euery man that will moue him to it, and such
a man may lawfully be slaine, not only by the
iudge, but by euery priuat person. But it is
said there in the 4. paragrafe, that he must first
be iudged by the law as an Ascismus ere he may
be slain, or his goods seised. And it is said fur-
ther there in the 2. paragrafe, that also in con-
science such an Ascismus may be slaine if it bee
done through a zeale of iustice and else not. Is
not the law of the realme likewise of men out-
lawed, abiured, or iudged for felony?

S. In the law of the realme there is no such
law, that a man shall bee iudged as an Ascis-
mus, ne if a man be in full purpose for a certain
sum of money that hee hath receiued, to slay
a man, yet it is no felony, ne murder in the law
till he hath done the act: for intent of felony nor
murder is not punishable by the common law
of the Realme, though it be deadly sin before
God, but in treason or in some other particu-
lar cases by statute that intent may be punish-
ed. And though a man in such a case kill a man
for money: yet it shall not bee admitted that
he

hee is an Ascismus. For as it is said before, there is no such terme of Ascismus in the law of the Realme, but he shal in such case be arraigned vpon the murther. And if he confesse it or plead that he is not guilty, & is found guilty by xij. men, he shall haue iudgement of life, and of member, and shal forsaite his lands and goods. And like Law is of an appeale brought of the murther; if he stand dumbe and will not answer to the murther, hee shall be attainted of the murther, & shall forsaite life, lands & goods: But if he be arraigned of the murther vpon an Indictment at the Kings suit, and therupon standeth dumbe and will not answer, there he shal not be attainted of the murther, but he shal haue painfort and dure, that is to say, hee shall be pressed to death, and he shal there forsaite his goods, and not his lands. But in none of these cases (that is to say) though a man bee Outlawed for murther or felony, or bee abiured, or that he bee otherwise attainted: yet it is not lawfull for any man to murther him, or slay him, ne to put him in execution but by authoritie of the Kings Laws. Insomuch that if a man bee adiudged to haue painfort and dure, and the officer beheadeth him, or on the contrarywise putteth him to paine fort and dure, where he should behead him, hee offendeth the law. And if an officer which hath authority to put a man to death, may not put him to death but according to the iudgement, then we thinke it should folloew that more stronger, a Stranger may not put such a man to death of his owne authority without commandement of

The 42. Chapter.

of the Law. But if the iudgement be that hee shalbe hanged in chaines, & the officer hangeth him in other things and not in chaines, I suppose he is not guiltie of his death: But some say he shall there make a fine to the king, because he hath not followed the words of the iudgement.

Also if a man that is no officer would arrest a man that is outlawed, abiured, or attainted of murder or felony, as is aforesaid, & he disobeyeth the rest, & by reason of the disobedience he is slaine, I suppose the other shal not be impeached for his death: for it is lawfull vnto every man to take such persons & to bring them forth that they may be ordred according to the law. But if a Capias be directed vnto the Shirefe to take a man in an action of debt or trespassse, there no man may take the man, but hee haue authoritie from the Shirefe: and if any man attempt of his own authoritie to take him, & he resisteth, & in the resisting is slaine, he that would haue taken him is guiltie of his death.

¶ Whether a man shall be bounden by the act or offence of his seruant or officer.

Cap. 42.

In the said sum called Summa Angelica, in the title Dominus iij. Paragrafe, is asked this question, whether a man shalbe charged for his household: and it is said that ther he shal when the household offendeth in an office or ministry

mstry that the Master is the chiefe officer of,
 and he hath the woꝝk and the profit of the hou-
 shold: foꝝ it shall be his default that he would
 chuse such seruants, foꝝ hee ought to appoint
 honest persons: But it is said there, that it is
 to be vnderstood ciuilly, & not criminally, wher-
 by, as is said there, hee that is a gouernour is
 bound foꝝ the offence of his officers, & that the
 same is to be holden of a Captain, that he shall
 be bound foꝝ the offence of his squier, and an
 host foꝝ his guest, and such other. Neuertheles
 it is said there, that certaine Doctoꝝs there re-
 heard, said therto, that if the office be an open
 oꝝ publike office, as an office of power, oꝝ other
 like, It sufficeth to bring foꝝth him that of-
 fended: But it is otherwise if it be not a pub-
 like office, but an host oꝝ a Tauerne, oꝝ other
 like. But if the houhold offend not in the office
 the Lord is not bound as to the Law, but in
 conscience he is bound if hee were in default by
 not correcting them, foꝝ hee is bound to correct
 them both by woꝝd and example, and if he find
 any incorrigible, he is bound to put him away,
 except that hee haue presumptions, that if hee
 do so, hee will be the woꝝse, and then hee may
 do that hee thinketh best and he is excused, and
 els not: foꝝ to such persons it is said, Error qui
 non resistitur, approbatur: (that is to say) an
 Error that is not resisted, is approued. And
 though diuers of the saying, befoꝝe rehearsed
 agree with the Law of the Realme, yet all doe
 not so, and also they that do are to be obserued
 by authoritie of the law of the Realme, & not by
 the authoritie alleaged in the said Paragrafe.

And

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And therefore I intend to treat somewhat where the Maister shall be charged by his seruant, or deputie, or by them that be vnder him in any office, & where not, and then I intend to touch some other things, where the Maister after the Lawes of the Realme shall be charged by the act of his seruant in other cases not concerning offices, and where not.

First, if a man be committed to ward vpon arrerages of account, & the keeper of the prison suffereth him to go at large, then an action of debt shall lye against him. And if hee bee not sufficient, then it lyeth against him that committed the keeping of the prison vnto him, and that is by reason of the statute of West. the 2. ca. 11. Also if Bailiffs of Franchises that haue Returne of writs make a false returne, the partie shall haue auerrement against it, aswell of too litte issues as of other things, aswell as he shall haue against the shirife, but al the punishment shal be only vpon the bailife, and not vpon the Lord of the franchise, and that doth appere by the statute made in the first yeare of king Ed. 3. the 1. chapter. But if an vnder-shirife make a returne wherupon the shirife shall be amerced, there the high shirife shall bee amerced, for the returne is made expresse in his name. But if it be a false returne wherupon an action of disceit lyeth, in that case it may bee brought against the vnder-shirife. And see therof the statute that is called Statutum de male returnantibus breuia.

Also if the kings Butler make deputies, he shall aunswere for his deputies as for himself,

as appeareth in the statut made in the 25. yere of King Edward the 3. De prodicionibus the 21. Chapter.

Also in þe statute that is called Statutu scaccarii it is enacted among other things, that no officer of the Exchequer shal put any clerk vnder him, but such as he will answer for. And forasmuch as the statute is generall: it seemeth that he shall answer as well for an vntruth in any such clerke as for an ouersight.

Also in the 14. yere of King E. the 3. ca. 9. it is enacted, that al Gailes shalbe appointed againe to the Shires, and that the Shirife shall haue the keeping of them, and that the Shirife shall make such vndergardeins for the which they will aunswere. And neuerthelesse I suppose that if there be an escape by default of the Gailler, that the king may charge the Gailler if hee will. But it is no doubt but he may charge the Shirif by reason of this statute if he wil. But if it be a wilfull escape in the Gailler which is felony in him, the Shirife shal not be bound to aunswere to the felonie, ne none other but the Gailler himseife, and they that assented to him.

Also if a man haue a Shirifewike, Constableship, or Bailiwike in fee, whereby hee hath the keeping of prisoners, if he let any to repleum that be not repleuithable, and thereof bee attaint, hee shall lose the office &c. And if it bee an Undersherife, Constable, or Bailife, that hath the keeping of the prison, that doth it without knowledge of the Lord, he shall haue imprisonment by three yeaers, and after shal be ransomed at the Kings Will, as appeareth

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in the statute of West. the 1. the 15. chap. And so it appeareth, that in this case, he that is the Lord of the prison, is not bound to answer for the offence of them that haue the rule of the prison vnder him, but that they shall haue the punishment themselves for their misdeemeanor. Also there is a statute made in the 27. yeare of king Ed. 3. the 19. Chap. that is called the statute of the Staple, wherby it is ordained, that no Marchant, ne none other mā shall not lease their goods for the Trespas, or forseit of their seruants, vnles it be by commandement of his Master, or that he offend in the office that his Master hath put him in, or els, that the Master shall be bound to answer for the deed of his seruant by the law marchant, as in some place it is vsed.

Also it is enacted in the 14. yeare of King Edward the 3. the 8. Chapter, that wapentakes and hundreds that be seuered from the Countie, shall be adioined againe vnto them, and that if the Shirefe hold them in his owne hands, that he shall put in them such bailifes that haue lands sufficient, and those for which he will answer, and that if he let them to ferme, that they bee let to the auntient ferme, but after it is prohibited by the Statute of the 22. yeare of king Henry the 6. the 10. Chapter. That no Shirefe shall let his Bailiwikes, nor wapentakes to ferme And when they be once in the Shirefes owne hands, and the Shirefes put in Bailifes, they be but as Underbailifes to the King and the Shirefe the high bailife, and they in maner the Shirefes seruants and put in
only

only by him. And therfore by the said statute of King Ed. the 3. hee shall answer for them, if they offend in their office, but if the Shirife let the to ferme, then though the Shirik offend the statute in that doing, yet whether hee shall be charged for their misdoemeanor in the office or not, is a great doubt to some men, for they say that this statute is only to bee understood where the bailiwikes be in the Shirifes hands, but here they bee not so, ne the bailifes bee not his seruants, but his sermons: And therfore they say, that if the Shirife shall be charged for them, it is by the common Law, & not by the statute aforesaid. Also in the 2. yere of King Henry the vij. the xiiij. Chap. it is enacted, that Officers by patent in euery court of the King, that by vertue of their office haue power to make clarks in the said courts, shall be charged & swozne to make such clarks vnder them, for whom they will answer. Also the Hospitallers & Templers be prohibit they shall hold no plee that belong to the Kings Courts, vpon pain to yeld damages to the partie grieved, & to make ransome to the king: that the superiours, shall answer for their obeyntees as for their owne deed. West. 2. cap. 4. Also the Sericant of the Cateury shall satisfie all the debts, damages, and executions that shall be recovered against any that is puruicour, or achator, vnder him that offend against the statute of xxxvj. of Edw. the iij. or against the statute of xxiiij. of Henry the vij. in case the puruicour, or achatur bee not sufficient &c. And the partie plaintife shall haue a Seire facias against the said

ser:

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Sergeant in this case to haue execution, as appeareth in the 24. yeare of king Henry the vi. the 1. Chapter.

Also if a man be sent to prison vpon a Statute marchant by the Maior, befoze whom the recognisance was taken, & the Gaillor wil not receiue him, he shal answere for the debt if hee haue wherewith, & if not, then he shall answer that committed the Gaile to him, as appeareth in the Statut called the Statut marchant.

Also if Outragious tolle bee taken in the towne Marchant, if it be the Kings towne let to farme, the king shal take the franchise of the market into his hands: And if it bee done by the Lord of the Towne, the King shall doe in likewise: And if it be done by the Bailife, vnknowing to the Lord, he shall yeeld againe as much as he hath taken, and shall haue imprisonment of xl daies: And so it appeareth that the Lord in this case shall not answer for his Bailife, VVest. the 1. cap. 30. And in al the cases befoze rehearsed, where the superiour is charged by the default of him that is vnder him, hee in whose default his superiour is so charged, is bound in conscience to restore him that is so charged through his default: Except y^e case befoze rehearsed of the Hospitellers, for al that the obediencer hath, is the superiours if he will take it. And therfore what recompence shalbe made by the obediencer in that case, is al at the will of the superiour. And now I intēd to shew thee some particuler cases, where the master after the lawes of y^e realm shalbe charged by the act of his seruant, bailife, or deputy, & where

where not, and so for to make an end of this Chapter

First for trespasse of battery, or wrongfull entry into lands or tenements, ne yet for felony or murther, the master shall not be charged for his servant, vnlesse hee did it by his commandement.

Also if a seruant borrow money in his masters name, the master shall not be charged wth it, vnlesse it come to his vse, and that by his assent. And the same law is if the seruant make a contract in his masters name, the contract shall not bind his master, vnlesse it were by his masters commandement, or that it came to the masters vse by his assent. But if a man send his seruant to a faire or market, to buy for him certaine things, though he commaund him not to buy them of no man in certaine, and the seruant both according, the master shalbe charged, but if the seruant in that case buy them in his owne name, not speaking of his Maister, the Maister shall not be charged, vnles the things bought come to his vse.

Also if a man send his seruant to the market with a thing which he knoweth to be defectiue to be sold to a certaine man, and he selleth it to him, there an action lyeth against the master: but if the maister biddeth him not sell it to any person in certaine, but generally to whom hee can, and he selleth it according, there lyeth no action of discent against the master. *2 Co. 469, 70*

Also if the seruant keepe the Masters fire negligently, wherby his masters house is bzēt and his neighbours also, there an action lyeth

*2 H. 4. 18. against
1. Roll. 1.*

against the Master. But if the servant beare fire negligently in the street, and thereby the house of another is burned, there lyeth no action against the Master.

Also if a man desire to lodge with one, that is no common Hosteler, and one that is seruāt to him that he lodgeth with, robbeth his chamber, his Master shall not be charged for that robbing: but if he had been a common Hosteler he should haue been charged.

Also if a man bee gardene of a prison, wherein is a man that is condemned in a certaine summe of money, and another that is in prison for felony, and a servant of the gardene that hath the rule of the prison vnder him, wilfully letteth them both escape, in this case the gardene shall answer for the debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the servant onely shall be put to answer to the felony, for the wilfull escape.

Also if a man make another his generall receiver, and that receiuer receiuet money of a creditour of his Master, and maketh him acquittance, and after payeth not his Master, yet that payment dischargeth the creditour: but if the creditour had taken an acquittance of him without paying him his money, that acquittance only were no barre to the Master, vnesse he made him receiuer by writing, and gave him authority to make acquittances, and then the authority must be shewed. And if the creditour in such case by agreement be-
tweene the receiuer and him, deliuered to the
receiuer

receiuer a horse or another thing in recompence of the debt, that deliuey dischargeeth not the creditour, vnlesse it be deliuered ouer vnto the Master, and hee agree to it. For the receiuer hath no such power to make no such comutation, but his master giue him special commandement thereto.

Also if a seruauit shew a Creditour of his master, that his master sent him for his money, and hee payeth it vnto him, that payment dischargeeth him not, if the master did not send him for it indeed, except that it come after vnto the vse of the master by his assent.

Also if a man make a bailife of a manor, and after the Lord of whom the Manor is holden grant the seignioy to another, and the bayliffe after payeth the rent to the grauntee, that payment of the rent counteruaileth no attournement though it were by fine, ne shall not bind his Master, till he attourne himselfe: but if the Lord of whom the land is holden disceised one of the seignioy, and the bayliffe payeth the rent to the heire of the Lord, that is a good seisin to the heir, though the bailiffe had no commaundement of his Master to pay it. For it belongeth to his office to pay rents seruice, but not rent charge as some men say.

Also an encroachment by the bailiffe shall not bind the master in auowzie, if he had no commaundement of the master to pay it. Also if there be Lord, mesne, and tenant, & the tenant holdeth of the mesne as of his manor of D. the mesne maketh a bailiffe, and after the tenant maketh a feffement, the feffor tendeth notice to the bailiffe.

The 43. Chapter.

and hee accepteth his rent with the arrearages, this notice shall not bind the Lord. ne compel him to alter his auowry: for the office of a bailie stretcheth not thereto, but hee must haue therein a speciall commaundment of his Master. Also if a seruant ride on his masters horse to do an errand for his Master into a Towne that hath authoritie to make attachments of goods vpon plaints of debt &c. & there vpon a plaint of debt made against the seruant, the Masters horse is attached by the Officers, thinking that the horse were his owne, and because the seruant appeareth not, the officers seise the horse as forfeit: in this case the Lord shall haue an action of trespass against the officers, & this attachmēt for the debt of his seruant, shall not bind him &c. But that an host or keeper of a Tauerne shalbe charged for their guests, vnclesse it be done by their assent or comādemēt, I do not remember that I haue read it in the lawes of England.

¶ Whether a villaine, or a bondman may
giue away his goods.

Cap. 43.

It appeareth in the said sum, called Summa Angelica, in the title Donatio prima the 9. Paragraphe, that a bondman, or a religious man, a Monke, ne such other that hath nothing in proper, may not giue, but it be by licence of their superiour: but that saying is not, as it is
said

said there, to be vnderstood of Religious persons that haue lawfull ministracion of goods, for if they giue with a cause reasonable, it is good, but without cause they may not.

Also if they by the licence of the prelate with the counsaile of the moze part of the Conent abide at schoule or goe on pilgrimage, they may giue as other honest scholers and pilgrimes be reasonably wont to doe: and they may also giue almes where there is great need, if they haue no time to aske licence.

Also if they see one in extreame necessity, they may giue almes though their superiours prohibite them, for then all things be in common by the law of God And therfore they be bound for to doe it, as appeareth in the aforesaid sum called Summa Angelica in 6 title Eleemosina, the 6. Paragrafe. Doth not the law of England agree with these diuersities? *Sir* For as much as the quest. on is onely made whether a villaine or a bondman may giue away his goods or not: and it seemeth that after the aforesaid sum, in the title which thou hast before rehearsed, that he ne none other that hath no property may not giue, wherby it appeareth that the said Sum taketh it, that a bondman should haue no property in his goods, & that therfore his gift should be void, I shall somewhat touch what propertie and what authoritie a villeine hath in his goods after the Law of the Realme, and what authoritie the Lord hath ouer them. And I will leaue the diuersities that thou hast remembred before of Religious persons to them that list to treate

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further therein hereafter.

First if a Villaine haue goods either by his owne proper buying and selling, or otherwise by the gift of other men, he hath as persone a proprietie, and also as whole interest in them, and may as lawfully giue them away as any free man may. But if the Lord seise them before his gift, then they be the Lords, and the interest of the villeine therein is determined.

Also if the Lord seise part of the goods of his villeine in the name of all the goods that the villaine hath or shall hereafter haue, that seisure is good, for al the goods that he had at the tyme of the seisure. But if goods come to the villeine after the seisure, he may lawfully giue them away notwithstanding the said seisure.

Also if the lord claime all the goods of the villein, and seiseth no part of them, that seisure is void, and the gift of the villein is good notwithstanding that seisure.

Also if a man bee bound to a villaine in an obligation in a certaine sum of money, & the lord seise the obligation, then the obligation is his, but yet he can take no action thereupon but in the name of the villeine: and therefore if the villein release the debt, the lord is barred by that release.

Also if a woman be a niece, and she marrieth a free man, the goods immediatly by the marriage be the husbands, and the lord shall come too late to make any seisure: and if the husband in that case maketh his wife his executrix and

and dieth, and the wife taketh the same goods againe as executrix to her husband, yet it shall not be lawfull for the Lord to take them from her, though she be a niece as she was before the marriage.

Also if goods be given to a man to the vse of a villeine, and the Lord seileth those goods, the seizure after some men is good by the Statute made in the 19. yere of R. 2. 7. wherby it is enacted, & the Lord shall enter into lands whereof other persons be seised to & vse of his villeins: and they say that the same Statute shall be understood by equitie of goods in vse, as well as of lands in vse.

Also if a villein be made a priest, yet neuertheless the Lord may seile his goods and lands as he might before: & until the seizure he may alien them and giue them away as hee might before he was priest. And in this case the Lord may order him, so that he shall doe him such seruice as belongeth to a Priest to do, before any other: but he may not put him to any labour nor other businesse, but that is honest and lawfull for a Priest to doe.

Also if a villeine enter into Religion in his yere of pricke, he may dispose his goods as hee might haue done before he take the habit vpon him.

And in likewise the lord may seile his goods as hee might haue done before, but if hee after make executors, and be professed, and the executors take the goods to the performance of the will: then the Lord may not seile the goods though the executors haue them to the performance

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enance of the wil of him that is his villedin, nor in that case the Lord may not seile his body, ne put him to no maner of labor, but must suffer him to abide in his religion vnder the obedience of his superiour as other religious persons do, that be not bondmen: And the Lord hath no remedy in that case for losse of his bondman, but only to take an action of Trespas against him that receiued him into Religion without his licence, & thereupon to recouer damages, as shalbe assessed by xij. men. Many other cases there be concerning the gift of the goods of a villedin, whereof I shal speake no moze at this time, for this that I haue said sufficeth to shew that the knowledg of the kings law is right expedient to the good order of conscience concerning such goods.

¶ If a Clerke bee promoted to the tytle of his patrimony, and after selleth his patrimony and after falleth to pouertie, whether shal he haue his tytle therein or not.

Cap. 44.

In the said summe called Rosella, in the title Clericus quartus, the 24 article, it is asked, if a Clerke be promoted to the tytle of his patrimony, whether hee may alien it at his pleasure, & whether in that alienation the solemnities needeth to be kept, that is to be kept in alienation.

nations of things of the church: and it is annexed there, that it may not be aliened no more than the goods of a spirituall benefice, if it be accepted for a title, and expressly assigned vnto him, so that it should goe as into a thing of the church, except he haue after another benefice whereof he may liue. But if it be secretly assigned to his tittle, some agree it may be aliened: and in this case by the Lawes of the Realme, it may be lawfully aliened whether it be secretly or openly assigned to his tittle, for the Ordinarie neyther the partie himselfe after the old custome of the Realme, haue no authoritie to bind any inheritance by authoritie of the Spirituall law: and therefore the land after it is assigned and accepted to be his tittle, standeth in the selfe same case to be bought, sold, charged, or put in execution, as it did before. And therefore it is somewhat to be marvelled that Ordinaries will admit such land for a tittle, to the intent that he that is promoted should not fall to extreame pouertie, or goe openly a begging, without knowing how the common law will serue therein: for of mere right all inheritances within this realme ought to be ordered by the kings lawes, and inheritance cannot be bound in this Realme but by fine, or some other matter of record, or by feoffment or such other, or at least by a bargain that charge an vse. And ouer that to assign a state for terme of life to him that hath a fee simple before, is void in the Lawes of England without it be by such a matter that it work by way of conclusion or eloppel, and in this case is no such

The 44 Chapter.

such matter of conclusion: and therefore al that is done in such case in assigning of the sayd title is void. Also there is no interest that a man hath in any manor, lands, or tenements for terme of life, for term of yeeres, or otherwise, but that he by the law of the realme may put away his right therein if he wil. And then when this man alieneth his land generally, it were against the law of the Realme that any interest of such a title should remaine in him against his owne sale: & there is no diueritie, whether the assignment of the title were open or secret, and so the title is voyd to all intents. And in likewise if a house of Religion, or any other spirituall man that hath graunted a title after the custome vled in such titles, sell all the lands and goods that they haue, that sale in the lawes of England is good as against the title, and the buyer shall neuer be put to answer to the title. Also some say, that vpon the common titles that be made daily in such case, that if he fall to pouerty that hath the title, he is without remedy: for they be so made that at the common Law there is no remedy for them, and if hee take a suit in the Spiritual court, many men say that a Prohibition or a Præmunire lyeth. And therefore it were good for Ordinaries in such case to counsell with them that bee learned in the Law of the Realme to haue such a forme deuised for making of such titles, that if need bee, would serue them that they bee made vnto, or els let them be promoted without any title, and to trust in God, that if they serue him as they ought to doe, hee will prouide for them

to

to haue sufficient for them to liue vpon. And beside theſe caſes that I haue remembred before, there be many other caſes put in the ſaid ſums for the well ordering of conſcience, that as me thinketh are not to bee obſcured in this Realme, neither in law nor conſcience.

D. Doſt thou then thinke that there was default in them that drew the ſaid ſums, and put therein ſuch caſes and ſuch ſolutions that as thou thinkeſt hurt conſcience, rather than to giue any light to it, ſpecially as in this realme. Sw. I thinke no default in them, but I thinke that they were right well and charitably occupied, to take ſo great paine and labor as they did therein, for the wealth of the people and clearing of their conſcience: for they haue thereby giuen a right great light in conſcience to all Countries where the law Ciuill and the Law Cannon bee vſed to temporall things. But as for the Lawes of this realme they knew them not, ne they were not bound to know them, and if they had knowne them, it would little haue holpen them for ſo countries that they moſt ſpecially made their treatiſes for: And in this contrrey alſo they be right neceſſarie and much profitable to al men, for ſuch doubts as riſe in conſcience in diuers other maners not concerning the law of the realme. And I maruell greatly that none of them that in this Realme are moſt bounden to doe that in them is to keepe the people in a right iudgement, and in a clerenesse of conſcience, haue done no more in time paſſed to haue the Law of the Realme knowne than they haue done,
for

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for though ignorance may sometimes excuse, yet the knowledge of the truth, and the true iudgment is much better, & sometime though ignorance excuseth in part, it excuseth not in all: and therefore me thinketh they did very wel if they would yet be callers on to haue that point reformed as shortly as they could. And now because thou hast wel satisfied my minde in many of these questions that I haue made, I purpose for this tyme to make an end. D. I pray thee yet shew me or that thou make an end mo of these cases, that after thine opinion bee set in diuers books of learning of conscience, that as thou thinkest for lacke of knowledge of the Law of the Realme, doe rather blind conscience, than giue a light vnto it: for if it be so, the surely as thou hast said it would be reformed, for I thinke verily the Lawes of the Realme in many cases must in this Realme bee obserued as well in conscience, as in the iudiciall Courts of the Realme. S. I will with god wil shew to thee shortly some other questions, that be made in the said sum, to giue thee another occasion, to see therein the opinions of the said sum, and to see farther thereupon how the opinions and the Lawes of the Realme do agree together. And yet beside these questions that I intend to shew vnto thee, there be many other questions of the said sum, that had as great need to be more plainly declared according to the Lawes of the Realme, as those that I shall shew thee hereafter, or as I haue spoken of before: but to the cases that I haue spoken of hereafter I will shew thee nothing

thing of my conceipt in them, but will leave it to other that will of charitie take some further paine hereafter in that behalfe.

¶ Diuers questions taken out of the Student of the sum, called Summa Rosella, & Summa Angelica, which he thinketh necessarie to be looked vpon, and to be seene how they stand and agree with the Law of the Realme.

Cap. 45.

The first question is this, whether a custome may break a law positue. Summa Rosella, titulo Consuetudo Parag. 13.

The second is, if a man attainted or banished be restored by the Prince, whether shal that restitution stretch to the goods, Summa Rosella in the title Damnatu, in principio.

Item, if a man bee outlawed of felony, abused, or attainted of murther or felony, or he that is an Ascismus may be slain by strangers: and see like matter therto, Summa Angel. in the title Ascismus Para. 11.

This question is somewhat answered to, in a new addition, as appeareth before in the 41. Chapter.

Item, whether the master shall be bound by the act, or offence of his seruāt, or officer, Summa
An

The 45. Chapter.

Angel. in the title Dominus, para 4.

This question is answered to in an addition, as appeareth before in the 19. Chapter.

Item, whether a bulleine may giue away his goods, Summa Angelica, in the title Donatio prima, para. 9.

This question is answered to in an addition as appeareth before in the 43. Chap.

Item, whether an Abbot may giue &c. Summa Angelica, in the title Donatio 1. Para. 10. & 39.

Item, whether a woman couert may giue away any goods. And it is answered. Summa Angelica in the title Donatio 1. Para. 11. that she may not, without she haue goods beside her dowry, but only in almes.

Item, if a man do treason, whether his gift of goods after, before attainder, be good. Summa Angelica, in the title donatio 1. par. 12. & it seemeth there nay, and looke Summa Angelica, in the title Alienatio, par. 14.

Item, if a man wittingly make a contract betwene two kinsfolke, or other that may not lawfully marrie together, whether he hath forsait his goods. Summa Ang. in the title Donatio 1. Par. 14.

Item, whether the father may giue to the son. Summa Ang. in the title donatio 1. Par 19. and Summa Roella, in the title Donatio 2. par. 42.

Item, whether a man may giue aboue v. l. s. absque insinuatione. Summa Angel. in the title Donatio 1. Para. 20.

Item, whether a gift shalbe auoided by any

ingratitude, Summa Rosella, in the title Donati
1. Parag. 17. & 29. and there it is said, \S the
gift is void by the law of nature, & looke Sum-
ma Angelica, in the title Donatio prima, Para-
graph. 42. & 45.

Item, where any gift betwene the husband
and the wife may be good, and it is said yea,
when the husband giueth it, Causa remunerati-
onis, Summa Rosella, in the title Donatio 1.
Para. 32.

Item if a man make a wil, & enter into relli-
gion, whether he may after reuoke the wil, and
it is said, that \S iers \S iudox may not, and o-
ther may. Summa Rosella, in the title Donatio
1, para. 35. in fine.

Item, if a mā giue another a towne with all
the rights that he hath in the same, whether \S
patronage &c. and the tithes passe. Summa Ro-
sella, in the title Ecclesia 1. Parag. 56.

Item, whether ali that is bought with the
money of the Church be the churches. Summa
Rosella in the title Ecclesia 1. Parag. 7.

Item, if a gift made to Monastery, may bee
auoided by that the giuer hath children after
the gift. Summa Rosella, in the title Donatio 1.
par. 43.

Item, if a man buy a thing vnder the halfe
price, whether he be bound by the Law to re-
store &c. Summa Rosella, in the title Emptio &
venditio, para. 6.

Item, whether a common theefe, vel cōmunis
depulator agrorum may abiure, Summa Ro-
sella, in the title Emunitas 2. in principio. Et ha-
betur

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betur ibi in fine, qđ licet leges excipiant plures personis tum per ius canonicum legibus derogatum est.

Item, whether a man shal take the Church for great enozmious offences that is not murder, nor felony. Summa Rosella, in the title Emunitas 2. Parag. 3. 11.

Item, if a man take one in the high way, and draw him out, & there beate him, whether hee shal haue punishment that is ordained for the that strike one in the high way. Summa Rosella, in the title Emunitas 2. Para. 6.

Item, whether hee that taketh the Church may after the offence be iudged to death. Summa Rosella, in the title Emunitas 2. para. 8.

Item, whether the Bishops palleis be sanctuaries. Summa Rosella, in the title Emunitas par. 24.

Item, whether the dignity of the Bishop, or Priesthood discharge bondage. Summa Rosella in the title Episcopus, in principio.

Item, whether a clerke is bound to pay any Impositions, or Tallages for his patrimonie or otherwise. Summa Rosella, in the title Excommunicatio 1. diuisione oct. para. 4. & 5 & 6. & diuisione nona, para. 1.

Item, if it were ordained by Statute, that if a man sell &c. he shal giue to the king ij. d. whether a clerke be bound to giue it if he sell of his prebend. Summa Rosella, in the title Excommunicatio 1. diuisione nona, para. 3.

Item, if it be ordained by statute, that there shal not be laied vpon a dead person, but such a certaine cloth, or thus many tapers, or candles

deis, whether the statute be good, & it is left for
aquestion. Súma Rosella in the title Excommu-
nicatio 1. diuisione 18. par. 8. in Fine.

Item, if a man make a lease of a Mill for terme
of yerres, & it is agreed that the lessee shal grind
the lessor tolle free during the terme, after the
lessor is made a earle or a duke, & hath greater
houshold thā before, whether the lessee be boūd
there &c. Súma Rosell. in the title Familia, Pa. 5.

Item, if a master wil not pay his seruants
swages, that hath serued him faithfully, whe-
ther that seruant may take secretly as much
goods of the masters &c. & if he do, whether hee
be bound to restitution, Summa Rosella, in the
title Familia. par. 6.

Item, things immouable of the church may
not be giuen. Súma Rosella, in the title Feodū,
parag. 1. And see there in principio what Feo-
dum is.

Item, whether the sons bastards, & the sons
lawfully begotten shal inherit together. Sum-
ma Rosella, in the title Filius, par. 1.

Item, whether father and mother may suc-
ceed to their bastards, Súma Rosella, in the title
Filius, para. 4.

Item, whether the father may leaue any of
his goods to his bastards, Súma Rosella, in the
title Filius, para. 5. And Summa Rosella, in the
title Societas, para. 23.

Item, whether the offence of the father shal
hurt the son in temporall things. Summa Ro-
sella, in the title Filius.

Item, if a man giue al his lands and goods
to his childe, whether a bastard shal haue any
part

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part Summa Rosella, in the title filius Par. 22.

Item, to whom treasure found belongeth Summa Rosella, in the title furtum Para. 11.

Item, if a deere, or other wild beast that is so sore hurt he may be taken; cometh into another mans ground, whether it be his that oweth the ground, or his that strake him, Summa Rosella in the title furtum, Para. 13.

Item, whether theft be in a little thing as well as in a great thing, Summa Rosella, in the title furtum. par. 18.

Item, what pain a theefe shall haue, Summa Rosella in the title furtum, par. 22.

Item, that if goods of dead men go to the heires, & that of damned men, s. De terris, Summa Rosella, in the title Hereditas, Para. 1.

Item, whether a man shall be said guiltie of murder by commādemēt, counsell, or assent, Summa Rosella in the title Homicidium 3. per totum, & like matter is Homicidium 4. in principio, and in diuers other cases.

Item, a man maketh a priue contract with a womā, & after hath a child by her, & after marieth another woman, and hath a child, she not knowing the first contract, which of the children shal be his heire. Summa Rosella in the title Illegitimus, Par. 4.

Item, whether the Pope may legitimate one to tempozal things, & to succeed, Summa Rosella in the title Illegitimus Para.

Item, if goods be found that were left of the owner as for saken, who hath right to them, Summa Rosella in the title Inuent Par. 2. And Ioke Summa Rosella in the title furtum, para. 17.

And

And thus I make an end of these questions: & because thou desirest me in the 31. Chapter, to shew thee somewhat, where ignorance excuseth in the Law of the realme, & where not, I will answer somewhat to thy question, and to commit thee to God.

Where ignorance of the Law excuseth in the lawes of England, and where not.

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Ignorance in \bar{h} law (though it be inuincible) doth not excuse as to \bar{h} law but in few cases: for euery man is bound at his perill to take knowledg what \bar{h} law of the realme is, as wel \bar{h} law made by statute as the cōmon law, but ignorance of \bar{h} deed, which may be called the ignorance of the truth of the deed, may excuse in many cases. D. I put case that a statute penall be made, & it is enacted that the statute shalbe proclaimed by such a day in euery shire, & it is not proclaimed before the day, & after the day a man offendes against the statute. Shall hee run in the penaltyes. I think yea, if there be no farther words in the statute to help him, that is to say, \bar{h} if the proclamation be not made, that no mā shalbe bound by \bar{h} statute, & the cause is this: there is no statute made in this Realme, but by the assent of the lords spirituall & tēporall, & of al the cōmons, that is to say, by the knights of the shire, citizens, and burgesles that be chosen by assent of the commons, which in the parliament represent the estate of the whole cōmons:

C. g.

And

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And every statute there made, is of as strong effect in the Law, as if all the commons were there present personally at the making thereof: and like as there needed no proclamation, if all were there present in their owne person, so the law presumeth there needeth no proclamation, when it is made by their authoritie, and the where it is enacted, that it shall be proclaimed &c. that is but of the fauours of the makers of the statute, & not of necessity: and it cannot therfore be taken, that their intent was that it should be void if it were not proclaimed. Nevertheless some be of opinion, that if a man before the day appointed for the proclamation offend the statute, that he should not in that case be punished, for they say, that the intent of the makers of the statute shall be taken to be, that none should be punished before the day, which is a doubt to some other: But admit it be as they say, that he shall be excused, yet he is not excused by the ignorance of the Law, but because the intent of the makers excuseth him. D. It is enacted in 7. yeare of R. 2. cap. 6. that every Shireffe shall proclaim the statute of Winchester thre times every yeere, in every market towne, to the intent the offenders shal not be excused by ignorance, & it so meth by those words, that if no Proclamation be made, that the offender may be excused by ignorance. S. Some take the intent of that statute to be, that the people by that Proclamation should haue knowledge of the Statute of Winchester, to the intent, that the forfeiture therein may be taken as well in conscience as in law: and some take the statute to be of

of such effect as thou speakest of, that is to say, that no forfeiture should grow vpon the Statut of Winchester against them þe were ignorant, but proclamation were made according to the said Statut of Richard. And if it be so taken the statute of Winchester is of small effect against most part of the people, for certain it is that the said proclamation is not made: but admit it be as they say, then they that be ignorant be excused by þe said particuler estatute, specially made in that case, and not by the general rules of the law: and sometime in diuers statutes Penals, they that be ignorant bee excused by the seife Statute, as it is vpon the Statut of Richard the 2. the 13. yere, the 2. statute, and the last Chap. where it is enacted, that if any person take a benefice by prouision that he shalbe banished þe realme & forfeit all his goods, and that if he bee in the realme, he auoid within 6. weekes after he hath accepted it, and that none shall receiue him þe is so banished after the said 6. weeks vpon like forfeiture if he haue knowledge: and so he that hath no knowledge is excused by þe expresse words of the statute. And in likewise he that offendeth against Mag. cha. is not excommunicated but he haue knowledge that it is prohibited that hee doth. For they bee onely excommunicated by þe sentence called *Sententia laci super carnis*, that doth it willingly, or that doth it by ignorance, & correct not themselves within 15. dayes after they haue warning. And sometime they that bee ignorant of a statute bee excused from the penalty of the statute, because it shal be taken that the intent of the makers of the Sta-

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tute was, that none should bee bound but they that haue knowledge: but that any man shalbe discharged in the law by ignorance of the law only for that he is ignorant, I know few cases except it might be applied to infants that be in their infancy, & within yerres of discretio, for if ignorance of the law should excuse in the law, many offenders would pretend ignorance. Do. Shall an infant that hath discretion, & knoweth good fro euill, be punished by a penal statute that he is ignorant in? S. If the statute be, that for the offence he should haue corporall paine, I thinke he shal be excused and haue no corporall paine: but I suppose that that is not for the ignorance, for though he knew the statute, & willingly offended, yet I think he shall haue no corporall paine: As where he plead Non-tenancy by deed that is found against him, or if he pleade a Record in A Wile, and faileth of it at his day: but that is because the law presumeth that it was not the intent of the makers of the statute, that hee should haue that punishment: but if he be of yerres of discretion to know good from euill, whether he shall then forfeit the penaltie of a penal statute it is more doubt, for it is commonly holden, that if an infant had not bin excepted in the statute of foreiudgement, & the foreiudgement should haue bound him, & so shall his cesser, & his leuying of a crosse against the statute, or if he be a gardein of a prison and suffer a prisoner escape, he shal pay the debt because the statutes be generall, & if he should by the statutes be bound in age, like reason will & he may by a statute penall lose his goods, D.

J

If an infant do a murther or a felony at such
 peeres as he hath discretion to knowe the law,
 shal he not haue the punishment of the law as
 one of full age? S. I think yes, but that is by an
 old Maxime of the law for escheuing of mur-
 ders & felonies, & so it is of a trespass: but these
 cases run not vpon the ground of ignorance, but
 with what acts infants shalbe punishable or
 not punishable, for the tendernes of their age,
 though they be not ignorant. D. Wee not yet
 knights & noble men that are bound most pro-
 perly to set their study to acts of chivalry, for
 defence of the realme, & husbandmen that must
 vse tillage & husbandry for the sustenance of the
 comminalty, & that may not by reason of their
 labor put themselves to knowe the law, dis-
 charged by ignorance of the law? S. So verily,
 for sith all were makers of the statute, the law
 presumeth that al haue knowledge of that that
 they make as it is said before: and as they bee
 bound at their perill to take knowledge of the
 statute that they make: so be all them that come
 after the. And as for knights and other nobles
 of the realme, me seemeth that they should bee
 bound to take knowledge of the law aswell as
 any other within the realme, except them that
 giue themselves to the studie & exercise of the
 law, & except spiritual iudges, & in many cases
 be bound to take knowledge of the law of the
 realme, as is said before in Cap. 25. For though
 they be bound to acts of chivalry, for the de-
 fence of the Realme, yet they bee bound also to
 the acts of Justice, & that (it seemeth) more than
 other be by reason of their great possessions and

T. iij.

autho:

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authoritie: and for the well ordering of the tenants servants, & neighbors, that many times haue need to their help, & also because they bee oft called to be of the kings counsell, & to be generall counsailes of the realm, wher their counsel is right expedient & necessary for the common wealth: and therefore if the noble men of this realme would see their children brought vp in such maner, that they should haue learning and knowledge, more than they haue commonly vsed to haue in time past, specially of the grounds & principles of the law of the realm wherin they be inherit (though they had not the high cunning of the whole body of the law, but after such maner as M. fortelcue in his booke that he entitleth the booke de laudibus legū Angliæ, aduertiseth the Prince to haue knowledge of the lawes of this realme) I suppose it would be a great help hereafter to the ministracion of Justice of this realme, a great suerty for himselfe, and a right great gladnes to all the people: for certain it is, the more part of the people would more gladly heare the rulers & gouernors intended to order them with wisdom and Justice, than with power & great retinues. But ignorance of the deed many times excuseth in the lawes of England, & I shall shortly touch some cases therof to shew wher it shal excuse, and where it shal not excuse, & then the reader may adde to it after his pleasure & as hee shall thinke to be conuenient.

¶ Certaine cases and grounds where ignorance of the deed excuseth in the lawes of England, and where not.

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If a man buy a horse in open market of him that in right hath no proprietie in him, not knowing but that he hath right, he hath good title and right to the horse, and the ignorance shall excuse him. But if he had bought him out of the open market, or if hee had knowne that the seller had no right, the buying in open market had not excused him. Also if a man retaine another mans servant not knowing that he is retained with him, the ignorance excuseth him both of the offence that was at common law against the Maxime that prohibited such retaining of an other mans servant, and also against the statute 33. Edw. 3. whereby it is prohibite vpon pain of imprisonment, that none shall retaine no servant that departeth within his term, without licence or reasonable cause: for it hath bene alway taken, that intent of the makers of the said Statute was, that they that were ignorant of the first retainour, should not run in any penaltie of the statute. And the same Law is of him that retaineth one that is ward to another, not knowing that he is his ward. And if homage be due and the tenaunt after that the homage is due maketh a feoffement, and after the Lord not knowing of the feoffement distraineth for the homage, in that case that ignorance shall excuse him of his damages in a replum though he cannot auow for the homage: but if he had knowne of the feoffement, he should haue paid damages for the wrongfull taking. Also if a man be bound in an Obligation that he shall
repaire

repaire the houses of him that he is bound to by such a certaine time, as oft as need shall require, & after the houses haue need to be repaired, but he that is bound knoweth it not, that ignorance shal not excuse him, for he hath bound himselfe to it, and so he must take knowledge at his perill: But if the condition had bin that he should repaire such houses as he to whom he was bound should assigne, & after he assigneth certaine houses to be repaired, but he that is bound hath no knowledge of that assignmēt, that ignorance shall excuse him in the law, for he hath not bound himselfe to no reparation in certain, but to such as the party wil assigne, & if he assigne none, he is bound to none: & therefore sith hee that should make the assignement is priuie to the deed, he is bound to giue notice of his own assignement: but if the assignement had bin appointed to a stranger, then the obligor must haue taken knowledge of the assignement at his perill. Also if a man buy lands whereunto another hath title which the buyer knoweth not, that ignorance excuseth him not in the law no more than it doth of goods. Also if a seruant come with his masters horse to a towne that by custome may attach goods for debt, & vpon a plaint against the seruant, an officer of the towne by information of the party attoucheth the Masters horse, thinking that it were the seruants horse, that ignorance excuseth him not: for when a man wil do an act, as to enter into land, seise goods, take a distresse, or such other, he must by the law at his perill see that that hee doth bee lawfully done, as in the

the case before rehearsed. And in likewise if a Shirefe by a Replewin deliuer other beasts thā were distrained, though the party that distrained shew him they were the same beasts, yet an action of trespass lyeth against him, and ignorance shall not excuse him: for he shall bee compelled by the law as al officers commonly be, to execute the Kings writ at his perill, according to the tenor of it, and to see that the act that he doth be lawfully done. But otherwise it is after some men, if vpon a Summons in a Praeipe quod reddat, the Shirefe by information of the demandant, summoneth the tenant in another mans lands, thinking it for the tenants land, there they say he shalbe excused: for in that case hee doth not seise the land, ne take possession in the land, but onely doth summon the tenant vpon the land, & the writ commandeth him not that he shall summon the tenant vpon his owne land, but generally that he shall summon him, & knoweth not in what land, & then by an old Maxime in the law it is taken, that he shal summon him vpon the land in demand: and therefore though he mistake the land & bee ignorant of it, yet if the demandant informe him that that is the land that he demaundeth, that sufficeth to the Shirefe as to his entry for the summoning as they say, though it bee not the tenants. And here I make an end of these questions for this time. Do. I pray thee yet or we depart take a little moze pain at my desire. S. what is that? D. That thou wouldest shew me thy mind in diuers cases of the Law of the realm, which (as me seemeth) had not so clearly with

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With conscience as they should doe. And therefore I would gladly heare thy conceit therein, how they may stand with conscience. S. But the cases and I shall with good will say as I thinke to them.

¶ The first question of the Doctor, how the law of England may be said reasonable, that prohibiteth them that be arraigned vpon an Indictment offelony er murder, to haue counsell,

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M ¶ I thinke that þ law in that point is very good & indifferent, taking the law therein as it is. D. why, what is the law in this point? S. The law is as thou saist, that he shall haue no counsell, but then the Law is farther, that in all things that pertaine to the order of pleading, the Judges shall so instruct him and order him, that he shall runne into no troperdie by his mispleading: As if he wil plede that he neuer knew the man that was slain, or that he had neuer a peny worth of þ goods that is supposed that he should steale, in these cases the Judges are bound in conscience to informe him that he must take the generall issue, and pleade that hee is not guiltie: for though they be set to be indifferent betwene the king and the partie as to the partie, and to the principall matter, as they bee in all other matters, yet they bee in this case to see that the partie take no hurt in forme of pleading in such matters,

ters, as he shal shew to be the truth of the matter, and that is a great fauour of the law: for in appeale, though the Iustices of fauor wil most commonly helpe forth the partie, and sometime his Counsell also in the forme of pleading, as they do also many times in common pleas, yet they might in those cases if they would bid the partie, and his counsell pleade at their perill. But they may not doe so with conscience vpon indictments as me seemeth: for it were a great vnreasonableness in the law, if it should prohibite him that standeth in ieopardie of his life, that he should haue no counsell, & then to drine him to plead after the strait rules, and formalities of the law that he knoweth not. D. But what if he be knowne for a common offender, or that the Judges know by examination, or by an euident presumption that he is guilty, & he asketh Sanctuarie, or pleadeth misnoliner, or hath some Record to plead, that he cannot plead after the forme: May not the Judges in such cases bid him plead at his perill? Se. I suppose they may not, for though he bee a common offender, or that he be guilty, yet he ought to haue that the Law giueth him, and that hee shal haue the effect of his pleas, and of his matters entred after the forme of the Law: and also sometime a man by examination, and by witnesse may appeare guiltie that is not: and is likewise there may be a vehement suspition that he is guilty, and yet hee is not guiltie, and therefore for such suspition, or vehement presumptions me thinketh a mā may not with conscience be put from that he ought to haue
by

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by þe Law, ne yet althogh the Judges knewe it
of their owne knowledge: but if it were in ap-
peale, I suppose that the Judges might doe
therin as they should thinke best to bee done in
conscience: for there is no law that bindeth
them to instruct him (but as they do common-
ly to the parties of fauor in al other cases) but
they may if they wil bid them plead at their pe-
rill by aduise of their counsell: and if the appella-
lee be poore, & haue no counsell, the court must
assigne him counsell if he aske it, as they must
doe in all other places, & that me thinketh they
are bound to do in conscience, though the ap-
pellee were neuer so great an offēdor, & though
the Judges knewe neuer so certainly that hee
were guiltie, for the law bindeth them to do it.
And so me thinketh that there is great diuer-
sity between an indictment & an appeale. And
the reason why the Law prohibiteth not coun-
sell in appeale as it doth in an indictment, I
suppose is this: There is no appeale brought,
but that of common presumption the appellan-
t hath great malice against the appellee: as
when the appeale is brought by the wife of
the death of her husband, or by the sonne of the
death of his father: or that an appeale of rob-
bery is brought for stealing of goods. And
therefore if the Judges should in those cases
shew theselus to instruct the appellans, the ap-
pellants would grutch & thinke them partiaill,
and therefore as well for the indemnitie of the
court, as of the appellee in case that hee bee not
guiltie, the Law suffereth the appellee to haue
counsel: but when that a man is indicted at the
Kings

Kings suit, & King intendeth nothing but iustice with fauour, & that is to the rest & quietnes of his faithful subiects, & to pul away misdoers among them charitably: and therfore he wil be contented that his Iustices shall helpe forth the offendors according to the truth, as far as reaso and iustice may suffer. And as the King wil be contented therein, it is to presume that the counsel wil be contented, and so there is no daunger therby, neither to the Court ne to the partie. And as I suppose for this reason it began that they should haue no counsaill byō indictments, & that hath so long continued that it is now growen into a custom, & into a maxime of the law, & they shal none haue. D. But if the Judges knew of their owne knowledge that the inditē is guilty, and then he pleadeth Misnomer, or a Record that he was autrefoies arraigned, and acquite of the same murder, or felony, and the Judges of their owne knowledge know, that the pleē is vnttrue, may they not then bid him plead at his peril: Sr. I think yea, but if they know of their own knowledge that he were guilty of the murder or felony, but that the plea was vnttrue they knew not, but by coniecture or information, I think they might not then bid him plead at his peril.

¶ The second question of the Doctor, whether warranty of the younger brother, that is taken as heire, because it is not knowne but that the eldest brother is dead. be in conscience a bar vnto the eldest brother,
as it is in the law.

Cap.

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Cap. 49.

A Man seised of lands in fee hath issue two sons, the eldest son goeth beyond the sea, and because a common voice is that hee is dead, the yonger brother is taken for heire, & father dieth, & yonger brother entreth as heire, & alieneth the land with a warrantie, and dieth without any heire of his body, and after the elder brother commeth againe, and claimeth the land as heire to his father, whether shal he bee barred by that warrantie in conscience as he is in the law? *Ser.* It is a Maxim in the Law, that the eldest brother shal in that case be barred, and that Maxim is taken to bee of as strong effect in the Law, as if it were ordeined by statute to bee a bar. And it is as old a law that such a warrantie shal bar the heire, as it is that the inheritance of the father shal only descend to the eldest son. And sith the law so is, why then should not conscience follow the Law, as well as it doth in that point, that the eldest son shal haue the land. *Do.* For there appeareth no reasonable cause whereupon the Maxim might haue a lawfull beginning: For what reason is it that the warrantie of an aunceler that hath no right to land, should bar him that hath right? And if it were ordeined by statute, that one man should haue another mans land, and no cause is exprest why hee should haue it, in that case though he might hold the land by force of that statute, yet he could not hold it in conscience, without there were

were a cause why he should haue it, & these cases bee not like as me seemeth to the forfeiture of goods by an Outlawry, for I will agree for this time, that that forfeiture standeth with conscience, because it is ordained for ministration of iustice, but I cannot perceiue any such cause here: and therefore me thinketh that this case is like to the Maxim, that was at the common Law of wreck of the Sea, that is to say, that if a mans goods had bin wrecked vpon the sea, that the goods should haue bin immediatly forfeited to the King. And it is holden by all Doctors that the Law is against conscience, except in certain cases that were too long to rehearse now. And it was ordained by the statute of Westminster the 1. that if a Dogge or Cat come ashore to the land, that the owner if hee proue the goods within a yere and a day to bee his, shall haue them, whereby the said Law of wrecks of the sea, is made more sufferable than it was before: and some thinke in this case that this warrantie is no bar in conscience, though it be a barre in the law. I pray thee keep that case of wrecke of the sea in thy remembrance, and put it hereafter, as one of thy questions, & thereupon shew mee thy further mind therein, and I shall with godd will shew thee my mind: & as to this case that wee be in now, mee thinketh the Maxim whereby the warrantie shalbe a barre, is good and reasonable, for it seemeth not against reason that a man shalbe bound, as to temporal things, by the act of his auncestor to whom hee is heire: for like as by the law it is ordained, that hee shall haue aduantage by

The 49. Chapter.

the same aunceſter, and haue all his lands by diſcent if he haue any right, ſo it ſeemeth that it is not vnreaſonable, though the law for the priuile of blood that is betwene them ſuffer him to haue a diſaduantage by the ſame aunceſter: but if the Maxime were, that if any of his aunceſtors, though hee were not heire to him, made ſuch a warrantie, that it ſhould be a barre, I think that Maxim were againſt conſcience, for in that caſe there were no ground, nor conſideration to proue how the ſaid Maxime ſhould haue a lawfull beginning, wherefore it were to be taken as a Maxime againſt the law of reaſon: but me thinketh it is otherwiſe in this caſe, for the reaſon that I haue made before. D. If the father bind him and his heirs to the payment of a debt and dye, in that caſe the Sonne ſhall not be bound to pay the debt, vnles he haue aſſets by diſcent from his father. And ſo I would agree, that if this man haue aſſets by diſcent from the aunceſtor that made the warrantie, that he ſhould haue bin barred: but elſe mee thinketh it ſhould ſtand hardily with conſcience that it ſhould be a barre. S. In that caſe of the obligation, the law is as thou ſayſt, the cauſe is, for that the Maxime of the law in that caſe is none other, but that hee ſhall be charged if hee haue aſſets by diſcent: but if the Maxime had bene generall, that the heire ſhould be bound in that caſe without any aſſets, or if it were ordained by ſtatute, that it ſhould be ſo, I thinke that both the Maxime and the ſtatute ſhould well ſtand with conſcience. And like law is where a man is bound

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as heire he may enter as he that had nothing by discent, but where he claimeth the land in his owne right, there the warranty of his ancestor shalbe a bar to him, though he haue no assents from the same ancestor, & though it bee said in Ezechiel Cap. 18. That the son shall not beare the wickednesse of the father, that is vnderstood spiritually. But as to temporal goods the opinion of Doctor is, that the son sometime may beare the offence of his Father. D. Now that I haue heard thy mind in this case, I will take aduise ment therein till a better leasure, and will now proceed to another question. S I pray thee do as thou saist, and I shall with god will make answer thereto as well as I can.

¶ The 2. question of the Doctor; If a man procure a collaterall warrantie, to extinct a right that he knoweth another man hath o Land, whether it be a bar in conscience as it is in the Law or not,

Cap. 50.

A Man is disseised of certain land, & disseisor selleth the land &c. & alienee knowing of the disseisin, obtaineth a release with a warraty of an ancestor collateral to & disseisor, that knoweth also the right of the disseisor, that ancestor collateral dyeth, after whose death the warranty descendeth vpon the disseisor, whether may the alienee in & case hold the land

The 50. Chapter.

in conscience as he may by the law: S. With the warrantie is descended vpon him, whereby he is barred in the law, me thinketh that he shall also be barred in conscience, and that this case is like to the case in the next Cha. before wherein I haue said that (as me thinketh) it is a bar in conscience. D. Though it might be taken for a bar in conscience in that case, yet mee thinketh in this case it cannot: for in that case the younger brother entred as heire, knowing none other but that he was heire of right, and after when he sold the land, the buyer knew not but that he that sold it had good right to sell it, and so he was ignozant of the title of the eldest brother, & that ignozance came by the default and absence of himselfe, that was the eldest brother. But in this case aswell the buyer, as he made the collateral warranty, knew the right of the disseise, and did that they could to extinct the right, and so they did as they would not should haue bin done to them: & so it seemeth he that hath the land may not with conscience keepe it. S. Though it be as thou saiest that all they offended in obtaining of the said collateral warranty, yet such offence is not to be considered in the law, but it bee in very special cases: for if such alleagins should be accepted in the law, releases, and other writings should be of small effect, and vpon every light summe, all writings might come in tryall, whether they were made with conscience or not. Therefore to auoid that incontinence, the law will driue the partie to aunswere oney whether it be his deed or not, and not whether the deed were made

made with conscience or against conscience, & though the party may be at a mischief thereby, yet the law will rather suffer the mischief than the said inconuenience. And like law is if a woman couert for dread of her husband by compulsion of him leuy a fine, yet the woman after her husbands death, shall not be admitted to shew that matter in auoiding of the fine, for the inconuenience that might folloow therupon. And after the opinion of many men, there is no remedie in these cases in the Chancery: for they say that where the common Law in cases concerning inheritaunce putteth the party from any aueriment for eschewing of an inconuenience that might folloow of it among the people, that if the same inconuenience should folloow in the Chauncerie if the same matter should be pleded there, that no Sub pena should lie in such cases, & so it is in the cases before rehearsed: For asmuch vexation, delay, costs and expences might grow to the partie if he should be put to answer to such aueriments in the Chancery, as if he were put to answer to the same at the common law: and therefore they thinke that no Sub pena lieth in the said cases ne in oother like vnto the. Neuertheles I do not take it that their opinion is that he that bought the land in this case may with good conscience hold the land, because he shall not be compelled by no law to restore it, but that he is in conscience and by the law of reason bound to restore it or other wise to recompence the partie, so as hee shall be contented, and I suppose verity it is so if hee will keepe his soule out of perill and

The 51. Chapter.

danger. And after some men to these cases may be resembled the case of a fine with nonclaime that is remembred before in the 14. Cha. of this booke, where a man knowing another to haue right to certain land, causeth a fine to be leuied therof with Proclamation, & the other suffreth by peres to passe without claime, in that case he hath no remedie neither by common law, nor by Sub pena, & that yet he that leuied the fine, is bound to restore the land in conscience. And me thinketh I could right wel agree that it should be so in this case, and that specially, because the party himselfe knoweth perfectly that the said collaterall warrantie was obtained by coun: & against conscience.

¶ The fourth question of the Doctour is of the wrecke of the Sea,

Cap. 41.

I pray thee let me now heare thy mind how the law of England concerning goods that be wrecked vpon the sea may stand with conscience, for I am in great doubt of it. S. I pray thee let me first heare thine opinion what thou thinkest therein. D. The Statut of West. the 1. that speaketh of wrecks is, that if any man, dog or cat, come aliue into the land out of the ship or barge, that it shall not bee iudged for wreck, so that if the party to whom the goods belong come within a pere and a day and proue them to be his, that he shal haue the or els that they shal remain to the king. And me thinketh that

that the said statute standeth not with conscience, for there is no lawfull cause why the partie ought to forfeit his goods, ne þ the King or Lords ought to haue the, for there is no cause of forfeiture in the party, but rather a cause of sorrow & heauines: And so the law seemeth to ad sorrow vpo sorrow: And therfore Doctors hold commonly, that he that hath such goods is bound to restitution, and that no custome may help, for they say it is against the comādemēt of God, Leu. 19. where it is commanded, that a man should loue his neighbour as himselfe, & tha they say he doth not, that taketh away his neighbours goods: but they agree that if any man haue cost and labor for the sauing of such goods wrecked, specially for such goods as would perish if they lay still in the water, as Sugar, Paper, Salt, Meale, and such other, that he ought to be allowed for his costs & labor, but he must restore the goods, except hee could not saue them without putting his life in ieopardy for them, & then if hee put his life in such ieopardy, & the owner by comon presumption had had no way to haue saued them, then it is most commonly holden, that he may keepe the goods in conscience: but of other goods that would not so lightly perish, but that the owner might of comon presumption saue them himselfe, or that might be saued without any perill of life, the takers of them be bound to restitution to the owner, whether hee come within the yeare or after the yeare.

And we thinketh this case is somewhat like to a case that I shall put if there were a Law

¶ iii.

and

The 51. Chapter.

And a custome in this realme, or if it were ordeined by statute, that if any alien came thzough the realme in pilgrimage, and died, that all his goods should be forfeit, that law should bee against conscience, for there is no cause reasonable why the said goods should bee forfeit: And no more mee thinketh there is of wrecke. S. There be diuers cases where a mā shal lose his goods & no default in him: as where beasts stray away from a man and they bee taken by and proclaimed, and the owner hath not heard of them within the yeare and the day, though hee made sufficient diligence to haue heard of them, yet the goods be forfeited and no default in him: & so it is where a man killeth another with the sword of J. at stile, the sword shall be forfeit as a Deodand, & yet no default is in the owner: and so me thinketh it may be in this case, and that sith the common law, before the said statute, was, that the goods wrecked vpon the sea, shalbe forfeit to the king, that they bee also forfeit now after the Statute, except they be saued by following the statute, for the Law must needs reduce the proprietie of all goods to some man, and when the goods be wrecked, it seemeth the proprietie is in no man: but admit that the proprietie remaine still in the owner, then if the owner percase would neuer claime, then it should not bee knowne who ought to take them: and so might they bee destroyed, and no profit come of them: wherefore me thinketh it reasonable, that the Law shall appoint who ought to haue them, and that hath the law appointed to the king as Soueraigne and head
ouer

ouer the people. D. In the cases that thou hast put befoze of the stray and Deodand, there be considerations why they be forfeit, but it is not so here: and mee thinketh that in this case, it were not unreasonable that the Law would suffer any man that would take them, to take and keepe them to the vse of the owner, sauing his reasonable expences, and this me thinketh were moze reasonable law, than to pull & property out of the owner without cause. But if a man in the sea cast his goods out of the ship, as forsake, there Doctors hold that euery man may take them lawfully that will: But otherwise it is (as they say) if he throw them out for feare that they should overcharge the ship.

S. There is no such Law in this Realme of goods forsaken: For though a man swine the possession of his goods, and saith hee forsaketh them, yet by the Law of the Realme the property remaineth still in him, and hee may seise them after when he wil: And if any man in the meane time put the goods in safegard to the vse of the owner, I thinke hee doth lawfully, and that he shall be allowed for his reasonable expences in that behalfe, as he shall be of goods found, but hee shall haue no property in them, no moze than in goods found. And I would agree, that if a man prescribe, that if he find any goods within his manoz, that hee should haue them as his owne, that that prescription were void: for there is no consideration how the prescription might haue a lawfull beginning, but in this case me thinketh there is. D. what is that? S. It is this, The King of the old custome

The 52. Chapter.

Some of the realme, as the Lord of the narrow sea is bound as it is said to scower the Sea of the Pirats & petit robbers of the sea. And so it is read of the noble king saint Edgar, that he would thise in the yere scower the sea of such pirats: but I meane not thereby that the king is bound to conduct his Marchants vpon the sea against all outward enemies, but that he is bound onely to put away such pirats and petit robbers. And because that cannot be done without great charge, it is not unreasonable if he haue such goods as be wrecked vpon the Sea toward the charge. D. Vpon that reason I will take a respite till another time.

¶ The fift question of the Doctor, whether it stand with conscience to prohibite a Iurie of meat and drinke till they be agreed.

Cap. 52.

If one of the xij. men of an enquest know the very truth of his owne knowledge, and instructeth his fellows therof, & they wil in no wise giue credence to him, & ther vpon because meat & drinke is prohibited them, hee is driuen to that point, that either he must assent to them and giue their verdict against his owne knowledge, and against his owne conscience, or dye for lacke of meat: how may the law then stand with conscience that will driue an innocent to that extremity, to be either forsworne, or to bee famished & dye for lacke of meat. S. I take not the law of the realme to be, that the Jury after they

they be sworn in ay not eate nor drinke til they be agreed of the verdict: but truth it is there is a Maxime, and an old custome in the law, that they shall not eate nor drinke after they be sworn till they haue given their verdict without the assent & licence of the Justices: & that is ordeined by the law for eichewing of diuers inconueniencies that might followe t. creupon, and that specially if they should eat or drinke at the costs of the parties, and therefore if they do the contrary, it may be laid in arrest of the iudgement: But with the assent of the Justices they may both eat and drinke; As if any of the Jurors fall sicke before they be agreed of their verdict so sore that he may not commune of the verdict, then by the assent of the Justices he may haue meat & drinke, and also such other things as be necessary for him and his fellows also at their owne costs, or at the indifferent costs of the parties if they so agree, or by the assent of the Justices, may both eat and drinke: and therefore if the case happen that thou now speakest of, and that the Iurie can in no wise agree in their verdict, and that appeareth to the Justices by examination, the Justices may in that case suffer them to haue both meat and drinke for a time to see whether they will agree, and if they wil in no wise agree, I thinke that the Justices may see such order in the matter, as shall seme to them by their discretion to stand with reason and conscience, by awarding of a new Enquest, & by setting fine vpon them that they shall find in default, or otherwise as they shall think best by their discretion, like

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The 53. Chapter.

as they may doe if one of the Iurie die before verdict, or if any other like casualties fall in that behalfe. But what the Iustices ought to doe in this case that thou hast put in their discretion, I will not treat of at this time.

¶ The 6. question of the Doctor, whether the colors that be giuen at the common law in Assises, actions of trespass, & diuers other actions, stand with conscience, because they be most commonly feined, and be not true.

Cap. 53.

I pray thee let me hear thy mind to what intent such colors be giuen, and sith they be commonly vnttrue, how they may stand with conscience? S. The cause why such colors be giuen is this, there is a Maxime and a ground of the Law of England, that if the defendant or tenant in any action plead a plea that amounteth to the generall issue, that he shalbe compelled to the general issue, and if he will not, hee shalbe condemned for lacke of answer, & the general issue in Assise is, that he that is named the disseisor hath done no wrong, nor no disseisin. And in a writ of Entry in the nature of Assise the generall issue is, that hee disseised him not. And in an action of Trespas that he is not guiltie, & so every action hath his general issue assigned by the Law, and the tenant must of necessitie either take the general issue, or plead some plea in abatement of the writ, to the iurisdiction, to the party, or els some bar or some matter by way of conclusion. And therefore if

That S. in fesse H. Hart of land, and a stranger bringeth an assise against the said H. Hart, for the land, whose title he knoweth not: In this case if he should be compelled to plead to the point of the assise, that is to say, that he hath done no wrong ne no disseisin, the matter should be put in the mouths of 12. lay men, which be not learned in the law, and therfore better it is that the law be so ordered, that it be put in the determination of the Judges, than of lay men. And if the said H. Hart in the case before rehearsed, would plede in bar of the assise that Jo. at Stile was seised, and enfeofed him, by force whereof he entred and asked iudgement, if that Assise should be against him, that ple were not good, for it amounteth but to the generall issue: and therfore he shalbe compelled to take the generall issue, or els the Assise shall be awarded against him for lack of answer. And therfore to the intent the matter may be shewed and pleaded before the Judges, rather than before the Jurie, the tenants vse to give the plaintife a colour, that is to say, a colour of deed on whereby it shall appeare that it were hurtfull to the tenat to put that matter that he pledeth to the iudgement of xij. mē, & the most common colour that is vsed in such case is this, when he hath pleded that such a man enfeofed him, as before appeareth, it is vsed that he shal plede farther, & say that the plaintife claiming by a colour of a deed of feoffment made by the said feoffor, before the feoffment made to him where no right passed by the deed, entered, by on whom he entred and asked Iudgement if
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The 53. Chapter.

the Wile lye against him. In this case because it appeareth to be a doubt to vnlearned men, whether the land passe by the deed without iury or not, therefore the law suffereth the tenant to haue that speciall matter to bring the matter to the determination of the Judges. And in such case the Judges may not put the tenant from the ploe, for they knowe not as Judges, but that it is true, & so if any default be, it is in the tenant & not in the Court. And though the truth be, that there were no such deed of feoffment made to the plaintife as the tenant pledeth, yet me thinketh there is no default in the tenant, for he doth it to a good intent as before appeareth. D. If the tenant knowe that the feoffor made no such deed of feoffment to the plaintife, then there is a default in the tenant to plead it: for hee switingly saith against the truth, and it is holden by al doctors that euery ly is an offence more or lesse, for if it be of malice, and to the hurt of his neighbor, then it is called *Mendacium pernitiosum*, & that is deadly sin: and if it be in sport, and to the hurt of no man, nor of custome bled, ne of pleasure that he hath in lying, then it is veniall sin, and is called in latin, *mendatium iocosum*: and if it be to the profit of his neighbour and to the hurt of no man, then it is also veniall sin, and it is called in latin, *mendatium officiosum*: and though it be the least of those iij. yet it is a veniall sin and would be reheswed. See. Though the midwives of Aegypt spied when they had reserved the male children of the Ihebrews, saying to the king Pharao, that the

the Hebrewes had women that were cunning
 in the same craft, which oz they came had re-
 serued the children aliue, where in deed they
 themselves of pity and of dread of God refer-
 ued them, yet Saint Hierome expounded the
 text following, which saith, that our Lord
 therefore gaue them houses, that is to be vn-
 derstood, that he gaue them spirituall houses,
 and that they had therefore eternall reward:
 and if they sinned by that lye, although it were
 but veniall, yet I cannot see how they should
 haue therefore eternall reward. And also if a
 man intending to slea another, aske me where
 that man is, is it not better for me to lye, and
 say, I cannot tell where he is, though I
 know it, than to shew where he is, where-
 upon murder should folloiw: Doct. The deed
 that the Midwives of Egypt did in sauing
 the children, was meritorious, and deserued
 reward euerlasting (if they beleued in God):
 did god da ds beside, as it is to suppose they
 did, when they for the loue of God, refused the
 death of the Innocents: and then though they
 made a lye after, which was but veniall sinne,
 that could not take from them their reward,
 for a veniall sinne doth not vtterly extinct cha-
 ritie, but letteth the seruour thereof: and there-
 fore it may well stand with the words of
 Saint Hierome, that they had for their good
 deed eternall houses, and yet the lye that they
 made to be a veniall sinne: but neuerthelesse, if
 such a lye that is of it selfe but veniall, be affir-
 med with an oth, it is alway mortal, if he knew
 it be false that he sworeth. And as to the other
 que-

The 53. Chapter.

question it is not like to this question that we
 haue in hand as me seemeth: for sometime a man
 for eschewing of the greater euill may doe a
 lesse euill, and then the lesse is no offence in him,
 and so it is in the case that thou hast put, where
 in because it is lesse offence to say, hee wotteth
 not where he is, though he know where he is,
 than it is to shew where hee is, whereupon
 murther should follow, it is therefore no sinne
 to say hee wotteth not where he is: for euery
 man is bound to loue his neighbour, and if hee
 shew in this case where he is, knowing his
 death should follow thereupon, it seemeth that
 he loued him not, ne that hee did not to him as
 he would be done to: But in the case that wee
 be in here, there is no such sinne eschewed: for
 though the party pleadeth the generall issue,
 the Jury might find the truth in euery thing,
 and therefore in that he saith that the plaintife
 claiming in by the color of a deed of feoffment,
 where nought passed, entred &c. knowing that
 there was no such feoffment, it was a lye in
 him and a veniall sinne, as me thinketh. And
 euery man is bound to suffer a deadly sinne
 in his neighbour, rather than a veniall sinne in
 himselfe.

S. Though the Jury vpon a general issue, may
 find the trueth as thou sayest, yet it is much
 moze dangerous to the iury to inquire of many
 points, than to inquire onely of one point. And
 forasmuch as our Lord hath giuen a comāde-
 ment to euery man vpon his neighbor: there-
 fore euery man is bound to force asmuch as in
 him is, by him no occasion of offence come to
 his

his neighbor. And for the same cause, the law hath ordeined diuers maxims & principles, whereby issues in the kings court may be ioynd vpon one point in certain as nigh as may be, & not generally, least offence might follow thereupon against God, & a hurt also vnto the Jury, wherefore it seemeth that he loueth not his neighbor as himselfe, ne that he doth not as he would be done to, that offereth such danger to his neighbor, where he may wel & conueniently keepe it from him, if he wil follow the order of the law, & it seemeth that he putteth himselfe wilfully in jeopardy that doth it, & it is written Eccle. 3. Qui amat periculum, in illo peribit; that is to say, he that loueth perill, shal perish in it, & he putteth his neighbor in perill to offend, putteth himselfe in the same, and so should he doe mee seemeth that would wilfully take the generall issue, where he might conueniently haue the speciall matter: and furthermore it is no offence in princes and rulers to suffer contracts, and buying and selling in Markets and Faires, though both periury and deceit will follow thereupon, because such contracts be necessary for the common wealth: so it seemeth likewise, that there is no default in the partie that pleadeth such a speciall matter to auoid from his neighbor the daunger of periurie, ne yet in the court though they induce him to it, as they do sometime for the intent before rehearsed. And in likewise some wil say, that if rulers of cities & communalities, sometime for the punishment of felons, murderers, & such other offenders wil (to the intent they would haue them to confesse

The 54. Chapter.

tesse the truth) say to them that bee suspected that they be informed of such certain defaults, or misdemeanors in the offendours, & that they doe to the intent to haue them to confesse the truth, that though they were not so informed, that yet it is no offence to say they were so informed, because they do it for the common welthe: for if offendours were suffered to go unpunished, the common wealth would euenly decay & utterly perish.

D. I wil take aduise ment vpon thy reason in this matter till another season, and I wil now aske thee another question somewhat like vnto this, I pray thee let me heare thy minde therein. S. Let me heare thy question, & I shal with good will say as I thinke therein.

- ¶ The 7. question of the Doctor concerning the pleading in Afsise, whereby the tenants vsle sometime to plede in such maner that they shall confesse no Ouster. °

Cap. 54.

It is commonly vsed as I haue heard say that when the tenant in Afsise pleadeth that a stranger was seised and enfeoffed him, and giueth the plaintife a colour in such maner as before appeareth in the xliij. Chapter, that the tenant many times when he hath pleaded thus, and the plaintife claiming by a colour of a deed of feoffment made by the said stranger, where nought passed by the deed, entred, and

and that then they vse to say further vpon
whom A. B. entred, vpon whom the tenant
entred, where in deed the said A. B. neuer en-
tred, ne haply there was neuer no such man:
How cā this pleding be excused of an vntruth,
and what reasonable cause can be why such a
pleading should be suffered against the truth?
Se. The cause why that maner of pleading is
suffered, is this: If the tenant by his pleading
confessed an immediate entry vpon the plain-
tife, or an immediate putting out of the plain-
tife, which in French is called an ouster, thē if
the title were after found for the plaintife, the
tenant by his confession were attainted of the
disseisin. And because it may be, that though
the plaintife haue good title to the land, that
yet the tenant is no disseisor: Therefore the te-
nant vsble many times to plead in such maner as
thou hast said befoze, to saue themselves from
confessing of an Ouster, & so if there be any de-
fault, it is not in the Court, ne in the Law, for
they know not the truth therein till it be tryed:
and we thinketh also that there is in this case
right little default or none in the tenant nor in
his counsell, specially if the counsell know that
the tenant is no disseisor. But as to that point
I pray thee that thou as thou hast taken a re-
spit to be aduised, or that thou shew thy full
mind in the questiō of a colour given in Aulse,
whereof mention is made in the said 48. Chap-
ter: that I likewise may haue a like respit in
this case till another time, to bee aduised, and
then I shall with good will shew thee my full
mind therevpon.

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D. I am content it be as thou saist, but I pray thee that I may yet adde another question to the 2. questions before rehearsed of the colours in assise, & feele thy mind therein, because that soundeth much to the same effect that the other do (that is to say) to proue that there be diuers things suffered in the law to be pleaded that be against the truth: & I pray thee let me hereafter know thy mind in all three questions, & thou shalt then with a good will know mine. S. I pray thee shew me the case that thou speakest of. D. If a man steale a horse secretly in the night, it is vsed that therupō he shalbe indicted at the kings suit, and it is vsed that in that indictment it shalbe supposed that he such a day, and place with force and arms (that is to say) with staues, swordes, and kniues, &c. feloniously stole the horse against the kings peace, & that forme must be kept in euery indictment, though the felon had neither sword nor other weapon with him, but that hee came secretly without weapon. How can it therefore be excused, but that therein is an vntruth? S. It is not alleadged in the indictment by matter in deed that he had such weapon, for the forme of an indictment is this.

Inquiratur p̄ dñō Rege, si A. tali die & An̄i apud talē locum vi & armis, videlicet gladijs &c. talem equum talis hominis cepit &c.

And then if the twelue men be only charged with the effect of the bill, that is to say, whether he be guiltie of the felony or not, and not whether hee be guiltie vnder such maner and forme as the bill specifieth or not: and so when they

they say *billa vera*, they say true as they take the effect of the bill to be. And therefore if there were false latin in the bill of indictment, & the Jury saith *billa vera*, yet their verdict is true: for their verdict stretcheth not to the trueth or falshood of the latine, but to the felony, ne to the form of the words, but to the effect of the matter, & that is to inquire whether there were any such felony done by the person or not: and though the bill vary from the day, from *h* yere, and also from the place where the felony was done in, so it vary not from the shire that the felony was done in, and the jury saith *billa vera*, they haue giue a true verdict, for they are bound by their oath to giue their verdict according to the effect of the bill, & not according to *h* forme of the bill. And so is he *h* maketh a *uow* bound likewise to that that by the law is the effect of his *uow*, and not onely to the words of his *uow*. And if a man *uow* neuer to eat white meat, yet in time of extreame necessity, he may eat white meat, rather than die, & not break his *uow*, though he affirmed it with an othe: for by *h* effect of his *uow*, extreme necessity was excepted, though it were not expressly excepted in the words of the *uow*: & so likewise though the words of the bill be to inquire whether such a man such a day and yere, and in such a place did such a felony, yet the effect of the bill is to inquire whether he did the felony within the shire or no: & therefore the Justices before whom such Indictments be taken, most commonly informe the Jury that they are bound to regard the effect of the bill, & not the forme.

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And therefore there is no vntruth in this case neither in him that made the bill, ne yet in the Jury, as me seemeth. D. But if the partie that owed the horse bring an action of trespassse, and declareth that the defendant took the horse with force and armes, where hee took him without force and armes: how may the plaintife there be excused of an vntruth? S. And if the plaintife surmise an vntruth, what is that to the Court or to the Law, for they must beleue the plaintif, til that he saith be denied by the defendāt. And yet as this case is, there is no vntruth in the plaintife, to say he took the horse with force and armes, though he came neuer so secretly, without weapon, for euery trespass is in the law done with force and armes, so that if he be attainted and found guiltie of the trespass, he is attainted of the force and armes: And lieth the law adiudgeth euery trespass to bee done with force, therefore the plaintife saith truly that hee took him with force, as the law meaneth to be force. For though he took the horse as a felon, yet vpon the felonious taking, the owner may take an action of trespass if he will, for euery felony is a trespassse and moze. And so I haue shewed thee some part of my mind to prooue that in those cases there is no vntruth, neither in the parties, neither in the Jury, nor in the Law. neuertheless, at a better leasure I will shew thee my mind moze fully therein with good will as thou hast promised me to doe in the cases of colours of the Tulse, and of the oyster, that be before rehearsed.

¶ The viij. question of the Doctor, whether the Statut of xlv. of Edward the third of Silua cedua stand with conscience.

Cap. 55.

In the 45. yere of the raigne of Ed. 3. It was enacted, that a prohibition should lie wher a man is impleaded in the court Christian, for business of wood of the age of xx. yere or above, by the name of Silua cedua; how may that statute stand with conscience that is so directly against the libertie of the Church, and that is made of such things as the parliament had no authoritie to make any law of? It appeareth in the said Statute, that it is enacted, that a Prohibition should lie in that case, as it had bin used to do before that time, and if the prohibition lay by a prescription before the Statute, why is not then the Statute good as a confirmation of that prescription? D. If there were such a prescription before the Statute that prescription was void, for it prohibiteh the payment of Tithes of trees of the age of xx. yere or above, and paying of tithes is grounded aswell upon the law of God, as upon the law of reason, & against those laws lieth no prescription as it is holden most commonly by al men. S. That there was such a prescription before the said Statute, & that if a man before said Statute had bin sued in the spiritual court for tithes of wood of the age of xx. yere or above, the prohibition lay, as

* iij.

appea-

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appeareth in the said statut : and it cannot be
 thought that a statute that is made by autho-
 rite of the whole realme, as well of the king and
 of the Lords spiritual & temporal as of all the
 commons, will recite a thing against the truth:
 & furthermore I cannot see how it can be groun-
 ded by the law of God, or by the law of reason
 that the x. part should be paid for tith and no o-
 ther portion but that, but I thinke that it be
 grounded vpon the Law of reason that man
 should giue a reasonable portion of his goods
 temporal to them that minister to him things
 spiritual, for euery man is bound to honoꝛ god
 of his proper substance, and the giuing of such
 portion hath not ~~be~~ only vsed among faithfull
 people, but also among vnfaithfull as it appea-
 reth Gene. 47. where corne was giuen to the
 priests in Egypt of comon barns. And S Paul
 in his Epistles affirmeth the same in many
 places, as in his first Epistle to the Cor. Ca. 9.
 where he saith, hee that worketh in the church,
 shal eate of that that belongeth to the Church:
 And in his Epistle to the Gal. cap. 6. he saith;
 Let him that is instructed in spiritual things,
 depart of his goods to him & instructeth him:
 And S. Luke. Cap. 10. saith; That the workman
 is worthy to haue his hire. All which sayings
 may right conueniently be taken and applyed
 to this purpose, that spirituall men which mi-
 nister to the people spirituall things, ought for
 their ministration to haue a competent liuing
 of them that they minister vnto. But that the
 tenth part should be assigned for such a portio
 and neither more nor lesse, I cannot perceiue
 that

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that that should be groundd by the Law of
reason, nor immediatly by the Law of God: for
before the law written there was no certaine
portion assigned for the spirituall Ministers,
neither the x. part, nor the xij. part, vnto the
time of Iacob: for it appeareth Gene. 28. that
Iacob auowed to pay Dismes which was a
mong the Iewes for the x. part, if our Lord
prospered him in his iourney, and if the x. part
had bin duety before that auow, it had bin in
vaine to haue auowed it, and so it had if it had
bin groundd by the law of reason: and as to
that is spoken in the Euangelists, and in the
new law of Cythes, it belongeth rather to
the giuing of tithes in the time of the old law,
than of the new Law, as appeareth Mathew
23. and Luke 11. where our Lord speaketh to
the Pharises, saying; woe to you Pharises &
tithem mints, rue, and herbes, & forget the iudge-
ment & the charitie of God, these it behoueth
you to doe, and the other not to omit, that is to
say, it behoueth you to doe Justice, and charity
of God, & not to omit paying of tithes though
it be of small things as of mints, rue, herbes,
and such other. And also that the Pharisey
saith Luke 17. I pay my tythes of all that I
haue, it is to be referred to the old Law not to
the time of the new Law: Therefore as I take
it the paying of Tythes, or of a certain por-
tion to spirituall men for their spirituall ministra-
tion to the people hath bin groundd in diuers
maners. First before the law written, a certaine
portion sufficient for the spirituall Ministers
was due to them by the Law of nature, which
after

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after them that he learned in the Law of the
 Realme is called the law of reason, & that por-
 tion is due by all lawes. And in the law writ-
 ten, the Jewes were bound to giue the x. part
 to their priests aswell by the said answ of Ia-
 cob, as by the law of God in the old Testamēt
 called the Judicials. And in the new Law the
 paying of the x. part, is by a Law that is made
 by the Church. And the reason wherefore the
 x. part was ordained by the church to be paid
 for the tithe was this; There is no cause why
 the people of the new law ought to pay lesse to
 the ministers of the new law, than the people
 of the old Testament gaue to the ministers of
 the old Testament: For the people of the new
 Law be bound to greater things than the peo-
 ple of the old Law were, as it appeareth Mat.
 5. where it is said: Vnlesse your good works
 abound about the workes of the Scribes & the
 Pharises, ye may not enter into the Kingdome
 of heauen. And the sacrifice of the old law was
 not so honorable as the sacrifice of the new
 Law is: for the sacrifice of the old Law was
 only the figure, and the sacrifice of the new law
 is the thing that is figured, that was the Ma-
 dow, this is the truth. And therfore the Church
 vpon that reasonable consideration ordeined,
 that the x. part should be paid for the sustenance
 of the Ministers in the new law, as it was
 for the sustenance of the Ministers in the old
 law, & so that law with a cause may be increa-
 sed or minished to more portion or to lesse as
 shall be necessaric for them. Do. It appeareth
 Gen. 14. that Abraham gaue to Melchisedech
 dimes,

A. D. 1511. in Morall.

dimes, and that is taken to be the x. part, and
 that was long before the Law written, & there-
 fore it is to suppose, that he did that by the law
 of God. S. It appeareth not by any Scripture
 that he did that by the commandment of God,
 ne by any reuelation: And therefore it is rather
 to suppose that hee did part of dutie, & part of
 his owne free will, for in that hee gaue the di-
 mes as a reasonable portion for the sustenance
 of Melchisedech and his ministers, he did it by
 the commaundement of the Law of reason, as
 before appeareth, but that he gaue the x. part,
 that was of his free will, & because he thought
 it sufficient & reasonable: but if he had thought
 the xij. part, or the xij. part had sufficed, hee
 might haue giuen it, and that with good con-
 science. And so I suppose that in the new law,
 the giuing of the x. part is by a Law of the
 Church, and not by the Law of God, vnlesse it
 be taken that the law of the church is the law
 of God, as it is sometime taken to be, but not
 appropziatly nor immediatly, for that is taken
 appropziatly to be the law of God, that is con-
 tained in scripture, that is to say, in the old te-
 stament and in the new. No. It is somewhat
 dangerous to say that tythes be grounded on-
 ly vpon the Law of the Church: for some men
 as it is said, say that mans Law bindeth not
 in conscience, & so they might happē to make a
 boldnesse therby to deny their tythes. S. I trust
 there be none of that opinion, & if there be it is
 great pity: And neuerthelesse they may be com-
 pelled in that case by the law of the Church to
 pay their tythes as wel as they shold be if paying

of

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of tithes were grounded merely vpon the law
of God. D. I think well it be as thou saist, and
therefore I hold me contented therein. But I
pray thee shew me thy mind in this question.
If a whole countrey prescribe to pay no tithes
for corne or hay, nor such other, whether thou
thinke that that prescription is good. S. That
question dependeth much vpon that that is said
before: for if paying of the x. part be by the law
of reason, or by the law of God, the h prescrip-
tion is void, but if it be by the law of man, then
it is a good prescription, so that the Ministers
haue a sufficient portion beside. D. Iohn Gerlō
which was a Doctor of diuinitie, in a treatise
that he named *Regulæ morales*, saith, that Dis-
mes be paid to Priests by the law of God. S.
The words that he speaketh there of the mat-
ter be these, *Solutio decimarū sacerdotibus, est
de iure diuino, quatenus inde sustentetur: sed quo-
ad tā hanc vel illā assignare, aut in alios red-
ditus cōmutare positui iuris existit*, that is thus
much to say, The paying of dismes to priests,
is of h law of god, h they may therby be sustai-
ned, but to assigne this portion or h , or to chāge
it to other rents, that is by the law positie: & if
it should be taken that by that word *Decima-
rū*, which in English is called dismes or tyths,
that he meant the x. part, and that that x. part
should be paid for tithes by the law of God, then
is the sentence that followeth after against
that saying: for as it appeareth aboue, the text
saith after ward thus, but to assigne this porti-
on or that, or to change it into other rents be-
longeth to the law positie, that is, to the law

6. Chapter. De decimis et redditibus. 1. 1. 1.

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of man, and if the ~~2~~ part were assigned by god,
 then may not a lesse part be assigned by the law
 of man, for that should be contrary to the Law
 of God, & so it should be void. And mee thin-
 keth that it is not likely that so famous a clerk
 would speake any sentence contrary to the law
 of God, or contrary to that he had spoken be-
 fore: & to proue he meant not by the terme De-
 cima, that dismes should alway be take for the
 x. part, it appeareth in the 4. part of his works
 in the 32. title Liber x, where he saith thus, Nō
 vocatur portio cura is debita ppter ea decime,
 eo quod semper sit decima pars, immo est inter-
 dum vicecima aut tricecima: That is to say, the
 portio due to curats, is not therfore called dis-
 mes, for ~~it~~ it is alway ~~the~~ x. part, for sometime it is
 the xx. or the xxx. part: and so it appeareth that
 by this word decimanū, he meant in ~~the~~ text be-
 fore rehearsed a certain portion, & not precisely
 the x. part, and that the portion should be payd
 to Priests by the law of God, to sustaine them
 with, taking as it seemeth the law of reason in
 that saying for the law of God, as it may one
 way be well and conueniently taken: because
 the law of reason is giuen to euery reasonable
 creature by God. And then it followeth pur-
 suantly, that it belongeth to the law of man to
 assigne this portion or that, as necessitie shall
 require for their sustentance, and then his say-
 ing agreeth well to that that is said before, that
 is to say, that a certaine portion is due for
 priests, for their spirituall ministracion by the
 law of reason. And then it would follow there-
 upon, that if it were ordained for a law, that al
 pay.

*I fear
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 of
 God
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*No
 satisfaction
 is
 made
 by
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 God
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 the
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 of
 man*

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paying of tithes should from henceforth cease,
 & that euery Curat should haue assigned to him
 such certain portis of land, rent, or annuity, as
 should be sufficient for him, & for such ministers
 as should be necessarie to be vnder him, accor-
 ding to the number of the people there, or that
 euery Parishioner or housholder should giue a
 certain of money to that vse, I suppose the law
 were good: & that was the meaning of Io. Ger-
 son as it seemeth in his words before reher-
 sed: where he saith, but to chaunge tythes into o-
 ther rents. is by the law positue, that is to say
 by the Law of man. And some thinke that if a
 whole Countrey prescribe to be quite of both
 tythes of cozne or grasse, so that the Spiritual
 Ministers haue a sufficient portion beside to
 liue vpon, that is a good prescription, & y they
 should not offend, that in such countreies payed
 no tithes: for it were hard to say, that all the
 men of Italy, or of the East parts bee dam-
 ned, because they pay no tythes, but a certaine
 portion after the custome: therefore certaine it
 is, to pay such a certaine portion, as wel they as
 all other be bound, if the church aske it, any cu-
 stome notwithstanding. But if the Church
 aske it not, it seemeth that by that not asking,
 the church remitteit it, & an example therof we
 may take of the Apostle Paul, that though he
 might haue taken his necessarie liuing of them
 that he preached to, yet he tooke it not, & neuer-
 thelesse they that gaue it him not, did not offend
 because he did not aske it. But if one man in a
 town would prescribe to be discharged of tithes
 of cozne & grasse, me thinketh the prescription

is not good, vnles he can proue & he recompenseth it in another thing: for it seemeth not reasonable that he should pay lesse for his tithes than his neighbors do, seeing that the spiritual ministers are bound to take asmuch diligence for him, as they be for any other of the parish: wherefore it might stand with reason & he should be compelled to pay his tithes as his neighbors do, vnles he can proue that he payeth in recompence thereof, more than the x. part in another thing. Nevertheless I leaue the matter to the iudgment of other, & then for a further proufe, though the said prescription of not paying tithes for trees of xx. yere & aboue, were not good, yet that that of corn & grasse should be good, some make this reason: they say, & there is no tith but it is either a predial tith, or a parsonal tith, or a mixt tith, & they say & if a tith should be paid of trees when they be sold, that the tith were not a prediall tith, for the predial tith of trees is of such trees as bring forth fruits & increase yearly, as apple trees, nut trees, pear trees, & such other, whereof the predial tith is the apples, nuts, pears, & such other fruits as come of the yere, & when the fruits be tithed, if the owner after sell the trees, there is no tith due thereby. for two tiths may not be paid of one thing, & of those tiths, & is to say, of predial tith was the commandment giuen in the old law to the Iewes, as appeareth Leuit 27. where it is said, Omnes decimæ terræ, siue de pomis arborum, siue de frugibus, domini sunt, & illi sanctificantur, & is to say, all tiths of the earth, either of apples of trees, or of grains, be our lords, & to him they be sanctified,

and

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and though the said law speaketh onely of apples, yet it is vnderstood of al maner of fruits. And because it saith that all the tythes of the earth be our Lords, therefore calves, lambes, and such other must also be tythed, and they be called by some men prediall tythes, that is to say, tythes that come of the ground, howbeit they call the only Predials mediate, and they be the same tythes that in this writing be called mixt tiths, and the other tythes (that is to say) tythes of apples & corne, & such other be called Predials immediate, for they come immediately of the ground, and so do not mixt tiths, as euidently appeareth. D. But what thinkest thou shal be the prediall tythes of ashes, elmes, sawlowes, alders, and such other trees as beare no fruits, wherof any profit commeth, why shall not the x. part of the selle thing bee the tith therfore. if they be cut downe as wel as it is of corne and grasse? S. For I think that there is to that intent great diuersitie betwene corne, grasse, and trees, and that for diuers considerations, wherof one is this: The property of corn & grasse is not to grow ouer one yere, & if it do, it will perish and come to nought, and so the cutting downe of it, is the perfection and preservation therof, and the speciall cause that any increase followeth of the same; And therefore the tenth part of the increase shall be paid as a prediall tythe, and there no deduction shall be made for the charges of it: And so it is of sheepe and beasts that must be taken and killed in time, for els they may perish and come to nought: but when trees be selled, that selling

is not the perfection of the trees, ne it causeth not them increase, but to decay: For most commonly the trees would bee better if they might grow still. And therefore vpon that that is the cause of the decay & destruction of them, it seemeth ther can no predial tithe arise: & some mē say that this was the cause why our Lord in the said chapter of Leuit. 27. gaue no commaundement to tithe the trees, but the fruits of the trees onely. D. It appeareth in Paralip. 31. that the Iewes in the time of the King Ezechias offered in the Temple all things that the ground brought forth, and that was trees as well as corne & grasse. S. It appeareth not that they did that by the commaundement of God, and therefore it is like that they did it of their owne deuotion, and of a fauour that they had aboue their dutie to the repairing of the Temple, which the king Ezechias had the cōmaunded to be repaired: And so that text proueth nothing that tithe should bee payed for trees: And therfore they say farther, that truth it is, that if a man to the intent hee would pay no tithes, would wilfully suffer his corne and grasse to stand still and to perish, hee should offend conscience thereby: but though hee suffer his trees to stand still continually without selling, because he thinketh a tithes would be asked, if he sold them (so that he doe it not of an euill will of the Curate) hee offendeth not in conscience, ne hee is not bound to restitution therfore, as he should be if it were of corne and grasse, as befoze appeareth: And another diuersity is this: In this case of tithes word, that

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tythe thereof would serue so little to that pur-
 pose that tythes be paid for, that it is not like-
 ly that they that made the Law for payment of
 tythes intended that any tythe should bee paid
 for trees or wood: For the spirituall ministers
 must of necessitie spend daily and weekly, and
 therefore the tythes of trees or wood that com-
 meth so seldome, would serue so little to the
 purpose that it should be paid for, that it would
 not helpe them in their necessitie: So that if
 they should bee druen to trust thereto, though
 it might help him in whose time it should hap-
 pen to fall, yet it should deceiue them that tru-
 sted to it in the meane time, and also should
 leaue the Parish without any to Minister to
 them. D. I would wel agree that for trees that
 beare fruit there should no prediall tythe be paid
 when they be sold (for the prediall tythe of them
 is the fruits that come of them) and so there
 cannot be two predials of one thing, as thou
 hast sayd. But of other trees that beare no
 fruit, me thinketh that a prediall tythe should
 be paid when they be sold, and so it appeareth
 that there ought to be by the constitution pro-
 uinciall made by the reuerend Father in God
 Robert Winchelsey late archbishop of Canter-
 burie, where it is said and declared, that Silva
 cedua is of euery kind of trees that haue being
 in that they should be cut, or that be able to
 be cut, whereof we will, saith he, that the pos-
 seffour of the said woods bee compelled by the
 censures of the Church to pay to the Parish
 Church, or mother Church, the tythe as a reall
 or prediall tythe: And so by vertue of that con-
 stitution

stitution prouinciall a prediall tithe must be paid of such trees as haue no fruite: For I would well agree that the said constitution prouinciall stretcheth not to trees þ̄ beare fruite as though þ̄ woods be generall for all trees (as before appeared.) S. I take not the reason why a prediall tithe should not be paid for trees that beare fruite to bee, because two prediall tithes cannot be paid for one thing: for when the tithe is paid of lambes, yet shall tithe be paid of wool of the same sheep (for it is paid for another increase) and so it may be said that the fruite of a tree is one increase, and the selling another: But I take the cause to be for the two causes before rehearsed, & also forasmuch as the selling is not properly an increase of the trees but a destruction of the trees, as it is said before. And farther I would heare thy mind vpon the said constitution prouinciall, which wil, that tithes should be paid for trees by the possessors of the wood, that if the possessor sell the wood for C. l. and giue the buyer a certain time to sell it in, what tithe shall the possessor pay as long as the wood standeth? D. I thinke none, for the prediall tithe commeth not til the wood bee felled, and a parsonall tithe he cannot pay, no more than if a man pluck downe his house and selleth it, or if he sel al his land, in which cases I agree well he shall pay no tithe neither parsonall nor prediall. S. And then I put case that the buyer selleth the wood againe as it is standing vpon the ground to another for C. c. l. What tithe shall be paid then? Doct. When the first buyer shal pay tithe of the surplusage that

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he taketh ouer the C. t. that he paid as a Parsonall Tithe. S. And then if the second buyer after that cut it doſſone and ſell it when it is cut down for leſſe than he paid, what tithe ſhal then be paid?

D. Then ſhal he that ſelle th them pay ½ tithe for the trees as a pꝛediall tithe. S. I cannot ſee how that can be, for he neither hath the trees, that the pꝛediall tithe ſhould be paid for, if any ought to be paid, nor he is not poſſeſſour of the ground where the trees grow: And therfore if any pꝛediall tithe ſhould be paid, it ſhould be paid either by the firſt poſſeſſour by reaſon of the words of the ſaid conſtitution pꝛouinciall, which be, that the tithe ſhal bee paid by the poſſeſſour of the wood, or by the laſt buyer, becauſe he hath the trees that ſhould be tithed, and by the firſt poſſeſſour the tithe cannot be paid as a pꝛediall, for he cut them not doſſone, ne they were not cut doſſone vpon his bargain, and by the laſt buier it canot be paid neither as a pꝛediall tithe; For the ſaid conſtitution ſaith, that the poſſeſſor of the woods ſhould be compelled to pay it. And therfore I ſuppoſe that the troth is, that in that caſe no tithe ſhall be paid, for as to the laſt ſeller, hee ſhall pay no parſonall tithe, for he gained nothing, as it appeareth before, and no pꝛediall tythe ſhall bee paid, for it ſhould be againſt the ſaid pꝛeſcription, and alſo the cutting doſſone is the deſtruction of trees and not their pꝛeſeruacion, as is ſaid before.

D. Then takeſt thou the ſaid conſtitution to be of ſmall effect, as it ſeemeth. S. I take it to be of

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of this effect, that of wood aboue twenty yeare it bindeth not, because it is contrary to the common law, and to the said prescription, that standeth good in the common law: but of wood vnder xx. yeare whereof tith hath ben accustomed to be paid, the constitution is not against the said prescription, because paying of tithe vnder xx. yeare is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common Law tythes should not be paid for wood vnder xx. yeare, no more than for aboue xx. yeare; and that Prohibition in that case lyeth by the common law; Neuerthelesse, because it hath bin suffered to the contrary, & that in many places tythe hath bin paid thereof, I passe it ouer, but where tithe hath not bin paid of wood vnder xx. yeare, I thinke none ought to be paid at this day in law nor conscience: But admit, that the said constitution taketh effect for payment of the wood vnder xx. yeares as of a prediall tythe, yet I cannot see how the tythe thereof should bee paid by the possessor of the wood, if hee sell them, but that it should be paid rather by him that hath the trees, for the constitution is, that the tythe shall be paid as a reall or a prediall tithe, and that is the tenth part of the same trees, as it is of corn. And if a man buy corne vpon the ground the buyer shall pay the tithe and not the seller, and so it should seeme to be here, and what the constitution meant to decree the contrary in tythe wood, I cannot tell, vnlesse the meaning were to induce the owners to pay tythes of great trees when they sell them to their owne vse:

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Which mee thinketh should bee very hard to
 stand with reason, though the said statute had
 neuer bin made, as I haue said before. And
 further more I would here (vnder correction)
 moue one thing, & that is this; That as it see-
 meth that they that were at the making of the
 said constitution knew the said prescription
 did not follow the direct order of charitie ther-
 in so perfectly as they might haue done: For
 when they made the said constitution, prouin-
 ciall directly against the said prescription, they
 set law against custome, and power against
 power, and in manner the spiritualtie against
 the tēporaltie, whereby they might wel know
 that great variance & suit should folloꝝ; And
 therefore if they had clerely seene that the said
 prescription had bene against conscience they
 should first haue moued the king and his coun-
 sell & the nobles of the realme to haue assented
 to the reformation of that prescription, and not
 to make a law as it were by authoritie & pow-
 er against the prescription, and then to threat
 the people & make them beleue that they were
 all accursed that kept the said prescription or
 maintained it. And it seemeth to stand hardly
 with conscience to repress so many to stand ac-
 cursed for following of the said statute and of
 the said prescription as there do, and yet to do
 no more than hath bin done to bring them out
 of it. Do He thinketh that it is not conueni-
 ent that they we should argue the laws and the
 decrees or constitutions of the Church, and
 therefore it were better for them to giue cre-
 dence to spiritual rulers that haue cure of their
 soules

soules than to trust to their owne opinions, and
 if they would doe so, then such matters would
 much the more rather cesse, than they wil go by
 such reasonings. S. In that that belongeth to
 the articles of the faith, I thinke the people be
 bound to beleue the Church, for the Church
 gathered together in the holy ghost cannot erre
 in such things as belong to the Catholike
 faith: But where the church maketh any lawes
 whereby the goods or possessions of the people
 may be bound, or by this occasion or that may
 be taken from them, there the people may law-
 fully reason whether the Lawes binde them
 or not, for in such lawes the Church may erre
 and be deceiued, and deceiue other, eyther for
 singularity, or for couetice, or some other cause,
 and for that consideration it pertaineth most
 to them that bee learned in the Law of the
 realme to know such lawes of the Church, as
 treat of the ordering of lands or goods & to see
 whether they may stand with the lawes of the
 realme or not: And therefore it is necessary for
 them to know the Lawes of the Church that
 treat of Disines, of executors, of testaments,
 of legacies, bastardie, matrimony, and diuers
 other, wherein they be bound to know when
 the Law of the Church must be followed, and
 when the law of the realme, wherof because it
 is not our purpose to treat, I leaue to speake
 any more at this time, and will resorte agayne
 to speake of Cythes, wherein some men say
 that of Tinne, Cole, and Lead, no tithes should
 be paid when they be sold by the owner of the
 ground, because it is part of the inheritance,

and it is moze rather a destruction of the inheritance, than an encrease: And therefore they say, that if a man take a Tinne worke, & giue the Lord the tenth dish according to the custome that the Lord shall pay no tythe of that tenth dish, neither prediall nor personall, but if the other that taketh the worke haue gaines & aduantage by the worke, it seemeth that it were not against reason that hee should pay a personall tythe of his gaines, the charge deducted. D. I pray thee shew me first what thou takest for a personall tythe, and vpon what ground personall tithes be paid as thou thinkest, so that one of vs mistake not another therein. S. I wil with good will, and therefore thou shalt vnderstand that as I take it, personall tithes be not paid for any increase of the ground, but for such profit as cometh by the labour or industry of the person, as by buying and selling, and such other, and such personall tythes, as I take it, must be ordered after the custome, and the Church hath not vlsed to leuie those tythes of compulsion, but by conscience of the parties: Neuertheles Raimond saith, that it is good to pay personall tythes, or with the assent of the parson, to distribute them to poore men, or els to pay a certain portion for the whole. But as Innocent saith, where the custome is, that they should bee paid, the people bee bound to pay them as well as predials, the expences deduct. Howbeit in the Church of England they vse to sue for such personall tythes as well as for predials, & that is by reason of the constitution prouinciall, that was made by Robert Winchelsie,

chelse, By the which it was ordained, that personall tythes should be paid of crafts and Marchandize, and of the lucre of buying and selling, & in likewise of Carpenters, Smiths, Weauers, Masons, and all other that worke for hire, that they shall pay tythes of their hire except they will giue any thing certaine to the use, or to the light of the Church, if it so please the Parson: And in another place the sayd Archbishop sayeth, that of the pastenage of woods, and such other things &c. and of fishings, trees, bees, doves, and of diuers other things there remembred, and of crafts, and of buying and selling, & of the profits of diuers other things there recited, euery man should helpe satisfie competently in the Church, to the which they be bound to giue it of right, no expences by the giuing of the sayd tythes deducted or withholden, but onely for the payment of tythes of crafts and of buying and selling: And by reason of the said constitutions prouincials, sometimes suits be taken in the Spirituall Court for personal tythes, and therof many men do marueile, because deductions many times must be referred to the conscience of the parties. And they marueile also why a Law should be made in this realme for paying of Personal tythes, moze than there is in other Countries. And here I would gladly mooue thee farther in one thing concerning such personall tythes, to know thy mind therein, and that is, If a man giue to another a horse, and he selleth that horse for a certaine summe, shall hee pay any tythe of that summe?

D. What

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Do. what thinkest thou therein? Se. I thinke that he shall pay no tithes: For there as I take it the profit commeth not to him by his owne industrie, but by the gift of another, and as I take it, personall tithes be not paid for euery profit or aduantage that commeth newly to a man, except it come by his owne industrie or labour, and so it doth not here. And also if he should pay tythe of that he sold the horse for, he should pay tythe for the very whole value of the thing. And as I take it, the personall tithes for buying and selling shall neuer bee paid for the value of the thing, but for the cleere gaines of the thing: And therefore I take the cases before rehearsed, where a man selleth his land, or pulleth downe a house, and selleth the stuffe, that he should there pay no tyth, that it is there to be vnderstood, & he hath not y^e land or house by gift or by discent: For if a man buy land, or buy timber and stuffe of a house, and sell it for a gaine, I suppose that he should pay a personall tithe for that gaine. And this case is not like to a fee or annuities graunted for counsell, where the whole fee shall be tithed for the charges deducted, or some certaine summe for it by agreement, for there the whole fee commeth for his counsell, which is by his owne industrie. But in the other case it is not so, and the same reason as for the personal tithe might be made of trees, when they discent or bee giuen to any man, and hee selleth them to another, that hee shall pay no personall tythe. Do. W^hee thinke that if the horse amend in his keeping, & then he sell the horse, that then the tithe shalbe paid
of

of that, that the horse hath increased in value after the gift, and so it may bee of trees, that hee shall pay tith of that that the trees may bee amended after the gift or discent. *Siu.* Then the tithe must bee the $\frac{1}{2}$ part of the increase the expences deducted, and then of trees the charges must also be deducted, for it is then a Parsonall tithe, and, there is no tree that is so much worth as it hath hurt the ground by the growing: therefore there can no Parsonall tith bee paid by the owner of the ground when he selleth them, though they haue increased in his time. *Neuerthelesse* I will speake no farther of that matter at this time, but will shew thee, that if *Tin*, *Lead*, *Cole*, or trees be sold, that a mixt tithe cannot grow thereby; for a mixt tithe is properly of *Calues*, *Lambes*, *Pigs* and such other that come part of the ground that they bee fed of, and part of the keeping, industrie, and oversight of the owners, as it is said before: but *Tin*, *Lead*, and *Cole* are part of the ground and of the freehold, & trees grow of themselves, and be also annexed to the freehold, and wil grow of themselves; and also the mixt tithe must bee paid yearly at certaine times appointed by the Law or by custome of the countrey, but it may happen that *Tin*, *Lead*, *cole*, & trees, shal not be sold or taken in many yerres, so it seemeth it cannot be any mixt tithe, & these be some of the reasons, which they would maintaine & statut a prescription to be good, make to proue their intet as they thinke. *Dr.* what thinke they, if a man sel the lops of his wood, whether any tith ought there to be paid?

S. They

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S. They thinke all one law of the trees and of the lops. D. And if he vse to fell the lops once in xij. or xvi. yeere, what hold they then? S. That is all one. D. And what is the reason why they ought not bee paid there as well as for wood vnder xx. yeare? S. For they say, that the lops are to be taken of the same condition as the trees bee what time soeuer they be felled, and that no custome will serue in that case against the statute, no more than it should do of great trees. D. And what hold they of the bark of the trees? Siu. Therein I haue not heard of their opinion, but it seemeth to bee one Law of the lops. Coct. I perceiue well by that thou hast said before, that thy minde is, that if a whole Countrey prescribe to bee quite of Tythes of trees, corne, and grasse, or of any other tithes, that that prescription is good, so that the spirituall ministers haue sufficient beside to liue vpon, dost thou meane so? S. Verberly. D. And then I would know thy minde if any man contrary to that prescription were sued in the Spirituall Court for corke and grasse, or any other Tythes, whether a Prohibition should lye in that case, as it did after thy minde before the said Statute, where a man was sued in the Spirituall Court for tithe wood.

S. I thinke nay. D. And why not there, as well as it did where a man was sued for the tithe wood? S. For as I take it, there is great diuersitie betwene the cases, and that for this cause; There is a Maxime in the law of England, that if any suit be taken in the Spirituall Court

court, whereby any goods or lands might be recovered, which after the grounds of the law of the Realme ought not to be tried, there though percase Kings Court shall hold no plea thereof, that yet a Prohibition should lye, and after when it had continued long that no tythes were paid of wood, because of the said prohibition, and that after by proccesse of time some Curats began to aske Tythes of wood, contrarie to the law and contrarie to the said prescription, so that variance began to rise between Curats and their Parishioners in that behalfe, then for appeasing the said variance the said Statut was made, and that as it seemeth moze at the calling on of the Spirituality than of the Temporality; for the Statut doth not expressely graunt that the Prohibition in that case of tythe wood should lye so largely as some say it lay by the Law: Howbeit, it doth not restraine the common Law therein, as it appeareth evidently by the words of the Statute, and so after some men it appeareth before the Statut, and also after the Statute (as I haue touched before) that the Spirituall Court ought not in that case to haue made any proccesse for tythe wood: and therefore if they did, a Prohibition lay by the comon Law. And like law is if the spiritual court make procces vpon such a Legacy as by the law of the realme is void. As if a man bequeth to one another mans horse, & the spirituall court thereupon maketh proccesse to execute that legacy, there a Prohibition lyeth; for it appeareth evidently in the libell, if all the truth appeare in the libell that

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in the law of the realme the legacie is boind to all intents : And that hee to whom the legacy is made,shal neither haue the horse nor the value of the horse. And in likewise if a man sell his land for C.l. and he is sued after in the spirituall court for tithe of the said C.l. There a Prohibition shal lie, for it appeareth in that case openly in the libell that no tith ought to be paid, and that the spirituall law ought not in that case to make any processe wherby the goods of him that sold the land might be take from him against the law of the Realme. And vpon this ground it is, that if a man were sued in the Spirituall Court, now sith the statute for a Mortuarie, that a Prohibition should lye, for it appeareth in the libell, that sith the statute there ought no suit to be taken for Mortuaries: and the same lawe is, if any suit were taken in the Spirituall court for a new dutie that is of late taken in some places vpon leases of Parsonages and vicarages, which is called Dimission noble, for it appeareth euidently in the libell if any be made thereupon, that no such Processe ought by the law of the Realme to be made in that behalfe. But in the case of tithe corne or grasse, or such other things, wherein thou hast desired to know my mind, there appeareth nothing in the libell but that the suit thereof, of right appertaineth to the spirituall Law, and so for any thing that appeareth, the partie may be holpen in the Spirituall Court by the prescription : And if the case were so far put that in the Spirituall Court they would not allow the said prescription, yet I thinke no

prohibition should lye: For though the spirituall Judges in a spirituall matter deny & parties of iustice, yet the kings lawes cannot reforme that, but must remit it to their conscience: But if there were some remedie provided in that case, it were well bene: For some men say, that in the spirituall Court they will admit no ploe against tithes. And also if a composition were made by assent of the Patron and also of the Ordinarie between a Parson & one of his parishioners, that the Parson & his successors should haue for a certain ground so many quarters of corne for his tithes perely, & after contrary to the composition the Parson in the spirituall Court, asketh the tithes as they fall, that in this case no Prohibition should lye, ne yet though the case were further put, that the composition were pleaded in the Court & were disallowed, but all resteth in the conscience of the Judge spirituall (as is said before.) Howbeit because some bee of opinion that a Prohibition should lye in this last case, therefore I will refer it to the iudgment of other: But in the case of prescription, before rehearsed, I take it for the clearer case, that no Prohibition should lie as I haue said before. And I beseech our Lord that this matter & such other like thereto, may be so charitably looked vpon, that there be not hereafter such diuisions ne such diuicilities of opinions therein, as hath bin in tyme past, whereby hath folloved great costs and charges to many persons in this Realme: And that hath moued me to speake so farre in this Chapter, and in diuers other Chapters in this present
book

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booke as I haue done: Nor intending thereby to giue occasion to any person to withhold his tithes that of right ought to be paid, ne to alter the portion therein before accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to be payed, and by none other. And that it may also somewhat appeare that the said statute of 45. Ed. 3. was well and lawfully made, and vpon a godd reasonable consideratiō, and that the said prescription is godd also, so that no man was in any danger of excommunication for the making of the said statute, nor yet is not for the obseruing thereof, ne yet of the said prescription, as it is noted by some persons that there should bee. And thus I commit the same vnto our Lord, who euer haue both the and me in his blessed keeping euerlastingly. Amen.



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